No. 90-1

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

IN RE: PAN AM CORPORATION; PAN AMERICAN WORLD AIRWAYS, INC.; PAN AM SHUTTLE INC.; PAN AM EXPRESS, INC.; PAA CORP.; ALLMAT INTERNATIONAL, INC.; ALERT MANAGEMENT SYSTEMS, INC.; PAN AM COMMERCIAL SERVICES, INC., *Debtors in Possession-Petitioners*,

SECTION 1110 PARTIES; OMNIBUS SECTION 1110 PARTIES; PS GROUP, INC.; GRAND CENTRAL PARTNERS NO. 1; GRAND CENTRAL PARTNERS NO. 2; GRAND CENTRAL PARTNERS NO. 3; UNITED STATES AIRLEASE, INC.; CL AIRCRAFT VII, INC; C.I.T. LEASING CORPORATION; THE CIT GROUP/EQUIPMENT FINANCING, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, as indenture trustee; NMB LEASE NV; ORIX CORPORATION; NISSHO IWAI CORPORATION; C. ITOH 7 CO., LTD;

(*Caption continued on inside cover*)

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Respondents-Respondents*,

—v.—

PAN AM CORPORATION,

*Debtor-Petitioner*.

## QUESTION PRESENTED

Whether the court below erred in ruling that section 1110 of the Bankruptcy Code, 11 U.S.C. § 1110, deprives airlines of the benefits of the automatic stay and other important protections of the Bankruptcy Code with respect to sale-leaseback transactions that simply provided financing based on an airline's existing fleet and did not add any aircraft to that fleet, thereby upsetting Congress' carefully crafted balancing of interests between the rights of creditors and the ability of air carriers to reorganize under chapter 11 of the Bankruptcy Code?

## PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the caption.* In addition to these parties, America West Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc., USAir, Inc., Continental Airlines, Inc., and the American Association of Equipment Lessors participated in these proceedings before the United States Court of Appeals for the Second Circuit below as *amicus curiae*.

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* The following information is provided pursuant to Rule 29.1 of this Court: Pan Am Corporation is the direct or indirect corporate parent of each of the other Debtors in Possession-Petitioners. A complete list of the corporate affiliations of each of the Debtors in Possession-Petitioners can be found in the petitions for reorganization filed in the United States Bankruptcy Court for the Southern District of New York on January 8, 1991 (Chapter 11 Case Nos. 91 B 10080 (CB) through 91 B 10087 (CB)).

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*In re Petrusch*, 667 F.2d 297 (2d Cir. 1981) (*per curiam*), *application denied*, 456 U.S. 911, *cert. denied*, 456 U.S. 974 (1982) ..... 16

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H.R. Rep. No. 1283, 74th Cong., 1st Sess. 4 (1935) ..... 8, 24

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**Other Authorities**

*Bankruptcy Filing by Metro Airlines*, N.Y. Times, Apr. 2, 1991, at D5, col. 2 ..... 12

Polaris Aircraft Income Fund IV, Prospectus (Oct. 15, 1987)..... 21

2 Gilmore, *Security Interests in Personal Property*, § 28.2 (1965)..... 22

5 *Collier on Bankruptcy*, ¶¶ 1110.01, 1123.01[4] (15th ed. 1990) .....15, 21, 28

Friendly, *Amendment of Railroad Reorganization Act*, 36 Colum. L. Rev. 27 (1936)..... 25

Gellene, *NWA Buys Stake in Hawaiian Air*, L.A. Times, Dec. 11, 1990..... 12

Gerstell & Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1 (1987)..... 17

Giddens & Schick, *Section 1110 of the Bankruptcy Code: Time for Refueling?*, 64 Am. Bankr. L.J. 109 (1990).....20, 28

Goldman, Album & Ward, *Repossessing the Spirit of St. Louis: Expanding the Protection of Sections 1110 and 1168 of the Bankruptcy Code*, 41 Bus. Law. 29 (1985) .....20, 21, 28

Greenberg, *The Savvy Traveler: Air Fares May Soar in Not-So-Friendly Skies*, L.A. Times, Mar. 10, 1991 . 12

Harlan, *Manning the Dikes*, 13 Rec. N.Y. City Bar Ass'n 541 (1958) ..... 13

Joyner, *Northwest Asks Unions For Help*, Detroit News, Feb. 3, 1991..... 12

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Nomani, *TWA May Seek Chapter 11 Status, Even in Route Sale*, Wall St. J., Apr. 3, 1991, at A4, col.3 12

Pelline, *Airline Graveyards See Business Taking Off*, San Francisco Chronicle, Apr. 1, 1991, at B1..... 12

Poole, *Air Competition Running on Empty*, Chicago Tribune, Mar. 11, 1991 ..... 12

Ziemba, *U.S. Tailspin May Aid Foreign Airlines*, Chicago Tribune, Feb. 17, 1991 ..... 12

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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IN RE PAN AM CORPORATION ET AL.,

*Debtors in Possession-Petitioners*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Debtors in Possession-Petitioners Pan Am Corporation, Pan American World Airways, Inc., Pan Am Shuttle Inc., Pan Am Express, Inc., PAA Corp, Allmat International, Inc., Alert Management Systems, Inc., Pan Am Commercial Services, Inc. ("Petitioners") respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on April 2, 1991.

## OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Second Circuit (App. A), Opinion and Order No. 67650 (App. B) of the District Court for the Southern District of New York, and the opinion (App. C) of the Bankruptcy Court for the Southern District of New York are currently unreported.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 2, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

This case involves section 1110 of chapter 11, title 11 of the United States Code (the "Bankruptcy Code"), 11 U.S.C. § 1110, which provides in relevant part that:

> (a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301) . . . that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board . . . to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—
>
> (1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and
>
> (2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

(A) that occurred before such date is cured before the expiration of such 60-day period; and

(B) that occurs after such date is cured before the later of—

(i) 30 days after the date of such default; and

(ii) the expiration of such 60-day period.

(b) The trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.

Section 1110 is an anomaly. The protection of the automatic stay provided by section 365 of the Bankruptcy Code, 11 U.S.C. § 365, which is central to the Bankruptcy Code's express purpose of promoting the reorganization of debtors, is compromised by section 1110's unique exception provided, in the case of airline reorganizations, to a narrowly defined group of financiers.

## STATEMENT OF THE CASE

### A. THE PROCEEDINGS BELOW

On January 8, 1991 (the "Petition Date") Pan Am Corporation, Pan American World Airways, Inc., Pan Am Express, Inc. and Pan Am Shuttle, Inc. (collectively "Debtors" or "Pan Am"), along with other affiliates of Pan Am Corporation, filed petitions for reorganization under chapter 11 of the Bankruptcy Code. On February 22, 1991, Pan Am brought on by order to show cause a motion seeking, *inter alia*, an order declaring that certain sale-leaseback transactions involving aircraft already in Pan Am's fleet at the time of the transactions were not covered by section 1110 (the "Section 1110 Motion"). On March 7, 1991, after a nonevidentiary hearing, the United States Bankruptcy Court for the Southern District of New York (Blackshear, J.) (the

"Bankruptcy Court") denied the Section 1110 Motion and Pan Am's motion for a stay pending appeal from the bench, and the next day issued an order incorporating its oral ruling.[1]

On March 8, 1991, the United States District Court for the Southern District of New York (Mukasey, J.) (the "District Court") denied Pan Am's request for a stay pending appeal of the Bankruptcy Court's order, but granted a request for an expedited appeal. On March 12, 1991, Pan Am appealed the denial of the stay and sought an order preserving the *status quo* from the United States Court of Appeals for the Second Circuit (the "Court of Appeals"). The Court of Appeals granted a stay of the Bankruptcy Court's order pending further hearing on the matter before the panel assigned to hear motions on Tuesday, March 19, 1991.

On the eve of that hearing, the District Court issued its ruling on Pan Am's appeal, affirming the Bankruptcy Court's denial of that part of the Section 1110 Motion which addressed the sale-leaseback issue. The District Court denied Pan Am's request for a stay pending appeal, but granted Pan Am's request under Fed. R. Civ. P. 54(b) to sever the ruling on the sale-leaseback issue from the other issue that remains on appeal.

On March 19, 1991, the Court of Appeals granted Pan Am a stay pending appeal of the District Court's order and an expedited appeal. Following a hearing on the merits on April 2, 1991, the Court of Appeals, in a per curiam opinion, affirmed the District Court decision and granted a further stay until noon, Friday, April 5, 1991 in order for Pan Am to seek a further stay from this Court. Pan Am now seeks to obtain review of the decision of the Court of Appeals by the Supreme Court of the United States.

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1 The Bankruptcy Court subsequently issued a written opinion, dated March 15, 1991.

## B. THE DECISIONS BELOW

### 1. The Bankruptcy Court's Decision

The Bankruptcy Court held that a "plain and literal reading" of section 1110 called for "a nonrestrictive reading of the words lease and lessor" to include sale-leaseback transactions, although it recognized that this would impose extreme hardship on Pan Am. The Court also recognized that this reading of the statute gave the benefits of section 1110 to "parties to numerous Sale-Leasebacks in which the Debtors 'sold' Aircraft and Equipment which had been part of their fleet for many years to financiers, who then leased that same Aircraft and Equipment back to the Debtors."

The Court conceded that there was an apparent logical flaw in its interpretation: "PMESIs [purchase money equipment security interests] and conditional sales are created for the very purpose of financing the acquisition of equipment [while] a sale-leaseback, where the air carrier sells to the lessor an aircraft that has been part of the air carrier's fleet for a substantial period of time, is a creative means of infusing working capital into the air carrier's business. Therefore, to some, there seems to exist an inconsistency in the statute since it extends equal protection to transactions which, at first blush, do not serve the same purpose."

The Court also conceded that "[i]t is possible that Congress intended to extend section 1110's coverage to only those agreements relating to the new acquisition of equipment by an air carrier [and that] [t]he legislative history seems to suggest that section 1110 was intended to protect transactions involving the financing of new acquisitions of aircraft by a debtor."

The Court concluded, however, that the legislative history was not sufficiently clear to allow it to deviate from its view of the "plain meaning" of the statute. The Court argued, based on its reading of the legislative history of section 116(5) of the Bankruptcy Act, which was enacted in 1957 and which was one of the predecessor provisions of section 1110, that

Congress did not have a single clear legislative purpose. The Court's reading of the earlier legislative history suggested additional congressional concerns over "title" and with respect to increasing "the availability of capital [to air carriers] at a lower interest rate."[2]

The Court failed to consider the legislative history surrounding the amendment of section 77 of the Bankruptcy Act in 1935, which was the model for section 116(5). That legislative history makes clear the acquisition purpose of section 77(j) which was the very beginning of the historic development of section 1110. The Court thereby committed the same error as did the Florida Bankruptcy Court in its dicta in *In re Braniff, Inc.*, 110 B.R. 980 (Bankr. M.D. Fla. 1990), by failing to consider section 77(j) and by taking language in the legislative history of section 116(5) out of its historical and logical context.

The Court also failed to explain why, if Congress was concerned with concepts of title, it extended section 1110's reach in 1978 to holders of security interests in equipment where title belonged to the Debtor, or why, if Congress was concerned with increasing the availability of low-cost financing

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2 The Court stated that it drew support from the following language in the legislative history:

> Testimony before the Bankruptcy Subcommittee of this committee indicated that the smaller lines are presently unable *to attract the capital necessary for their current reequipment requirements*. Testimony also indicated that the enactment of this bill would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions. The reason for this is the greater security afforded conditional sales vendors and lessors by the amendment to Chapter X made in this bill.

H.R. Rep. No. 944, 85th Cong., 1st Sess. 1-2 (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926 (the "1957 House Report") (emphasis added).

The 1957 House Report concludes as follows: "This would establish an exception similar to that now accorded to rolling stock of railroads under Section 77j. It is contemplated that the enactment of this bill will result in extensive use of equipment trust financing as the financial basis for a major reequipment program." *Id.* at 1927.

generally, it specifically excluded general mortgages from coverage under section 1110.[3]

The bottom line is that the Bankruptcy Court was reluctantly driven by its misapplication of the "plain meaning" rule to reach a harsh result for which it could muster no credible support in terms of logic or legislative history.

### 2. The District Court's Decision

The District Court produced on an expedited basis an opinion that like that of the Bankruptcy Court relies heavily on the "plain meaning rule."[4] After stating that "[o]n its face,

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3 Indeed, the 1978 House Report makes it perfectly clear that Congress did not think it was perpetuating the importance of "title," but was eliminating title as a requirement.

> An attempt was made to preserve the limitations on the right of the financier contained in current law. However, certain changes were made. First, the proposed sections provide protection for equipment security interests. The term includes only security interests that were granted to finance the acquisition of the covered equipment. A general mortgage is excluded. Under present law, the protection applies only to leases and conditional sales of equipment. The theory behind the present limitation is that under leases and conditional sales, title of the property does not pass to the debtor, but remains in the financier. Thus, it is appropriate to exclude what is not property of the estate from the automatic stay in a reorganization case.
>
> *Changes in financing practices and in the bankruptcy laws have suggested that the former limitation be deleted*, and that the protection be expanded to cover equipment security interests. . . . *Because retention of the prior limitation would unnecessarily force equipment financing transactions into outmoded forms, protection of security interests was added to make financing forms more flexible and more consonant with modern law.*

H.R. Rep. No. 595, 95th Cong., 1st Sess. 238-41 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6199-6200 (the "1978 House Report") (emphasis added).

4 The Court disagreed with the opposite holding of the Bankruptcy Court in Delaware, which was presiding over the chapter 11 proceeding

the statute is unambiguous," the Court, however, in the very next sentence of its opinion proves, in truth and in fact, that this is not the case. It states "[t]o the extent a party is a *true* lessor and otherwise qualifies under the statute, it is entitled to the 'extraordinary protection of § 1110.' " (emphasis added). Of course the word "*true*" does not appear in the language of section 1110 but is a limitation on the words of the section that the Court believes is required by the legislative purpose as demonstrated by the language of the statute and its legislative history. The rest of the Court's opinion then surveys the true battleground for this appeal—how section 1110 should be interpreted in light of its legislative history and purpose.

The Court recognized the relevance of the legislative history of the amendment to section 77, enacted in 1935, conceding "[t]hat provision had been enacted '[i]n view of the necessity of readily financing purchases of new equipment at a time when the development of the transportation art is providing new forms of equipment.' " (citing H.R. Rep. No. 1283, 74th Cong., 1st Sess. 4 (1935)).

The Court also conceded that the legislative history of section 116(5) shows a congressional concern with the need of airlines to " 'replace obsolete equipment with modern aircraft.' " The Court concluded, however, based on the same misreading of the House Report as the Bankruptcy Court, that while "Congress may have had the ultimate end in 1957 of encouraging airlines to acquire new equipment, one means to that end incorporated in the statute was to increase the availability and decrease the cost to an airline of capital."

Not only is this interpretation of the legislative history not supported by a close reading of the House Report but it fails

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of *Continental Airlines, Inc.*, the nation's fifth largest airline. *In re Continental, Inc.*, Ch. 11 Case Nos. 90-932 through 90-980 (Bankr. D. Del. Jan. 30, 1991) (Balick, Bankr. J.). That decision was reversed on April 1, 1991 by the United States District Court for the District of Delaware in an opinion that has not yet been published (which we have submitted separately to the Court).

as a matter of logic. If Congress was seeking merely to make low-cost financing available to airlines, why did it limit the category of financiers and the types of collateral that were protected? Moreover, since even the District Court conceded that the ultimate purpose was to help carriers obtain new equipment, how could there be any assurance that the money raised would be used for new equipment rather than for some other purpose (such as to fund operating losses as was the case with Pan Am), if the protection of the statute was not limited to acquisition financing?

The Court then addressed the legislative history of 1978 Bankruptcy Code. It conceded that the history of section 1110 demonstrates with precision that "Congress refused to include [U.C.C.] Article 9 transactions within § 1110 unless they included an acquisition element [and that] Congress also demonstrated its intention in the clearest way it could, through the words it used, by limiting the statutory protection to a 'secured party with a *purchase-money* equipment security interest.' "

The Court found, however, that the same history "fails to show with any clarity that Congress also intended *to add* an acquisition element to lease transactions." (emphasis added). The Court's conclusion is therefore the result of a compounding of its erroneous interpretation of the prior law.

It also ascribes an almost capricious intent to Congress in enacting section 1110. The Court recognized that certain of the 1978 changes were motivated by a desire to have the provision apply to "financing forms more flexible and more consonant with modern law." The Court's conclusion, however, is that Congress for some unexplained reason intended that if a financier used these modern flexible security devices it was protected only if it engaged in acquisition financing, but if the financier could structure its financing to take advantage of older and generally obsolete financing forms, then it was protected for an advance of funds for any purpose whatsoever.

The Court attempted to justify its conclusion based on an analysis of the grammar of section 1110. Its determination, however, that "the acquisition element explicitly imposed on secured parties, and the acquisition element inherent in the status of conditional vendors, implies no such acquisition element with respect to lessors," simply flies in the face of history, logic and well accepted principles of statutory construction.[5]

Finally, the Court attempted to bolster its determination with policy arguments based on the virtue of sale-leaseback transactions, although it acknowledged that "[s]ale-leaseback transactions of the type and complexity in which Pan Am engaged may not have been directly contemplated at the time of the statute's enactment, nor explicitly mentioned in the legislative history." The Court's argument that sale-leaseback transactions may somehow lead to, or serve as a bridge for the acquisition of new and improved equipment, is not only unsupported, it is contradicted, by the record in this case. Sale-leasebacks of 20-year-old planes such as the financings at issue on this appeal did not result in new equipment for Pan Am, but necessarily required Pan Am to retain and to continue making rental payments on older equipment. They also removed the airline's incentives to upgrade equipment since any increased residual value would inure to the benefit of the sale-leaseback financier and not the airline.

The irony of these fanciful arguments in support of the "plain meaning" of the statute is that not only are they unsound, they find no support in the legislative history whatsoever. Indeed, if Congress wanted simply to promote generally affordable secured financing for airlines it could have simply provided that airlines were ineligible to file for chapter 11 (which may, in effect, be the practical result of the lower

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5 Aside from disregarding the legislative history of the 1935 and 1957 statutory predecessors of section 1110, the Court also failed to apply the principle of common sense construction known as the doctrine of "*noscitur a sociis*" which provides that the meaning of particular words of a statute may be ascertained by reference to the meaning of the words with which they are associated.

Court's decision); it would not have crafted a narrowly drawn provision such as section 1110 which continued the limitations Congress thought it placed in prior laws to encourage acquisition financing; and it certainly would not have admonished the courts to construe the provision narrowly to avoid a collision with other goals of the Bankruptcy Code.

### 3. The Court of Appeals's Decision

The Court of Appeals, in a per curiam opinion, affirmed the decision of the District Court "for substantially the reasons stated by Judge Mukasey."

## REASONS FOR GRANTING THE WRIT

## THE DECISIONS OF THE COURTS BELOW RAISE SIGNIFICANT QUESTIONS CONCERNING THE APPLICABILITY OF SECTION 1110 OF THE BANKRUPTCY CODE THAT HAVE NOT BEEN ADDRESSED PREVIOUSLY BY THIS COURT

### A. THE SCOPE OF SECTION 1110 IS A MATTER OF NATIONAL IMPORTANCE

No provision of the 1978 Bankruptcy Code has greater significance for an airline's ability to reorganize than section 1110. Unless an airline is able to comply with its section 1110 obligations, it will not be able to retain certain of its most essential assets—its aircraft affected by section 1110—for more than sixty days after filing a petition. The expansive definition of section 1110 to include sale-leaseback transactions adopted by the courts below, effectively denies the benefits of chapter 11 to Pan Am and many other of the nation's sorely troubled airlines.

The irony of this expansive interpretation of section 1110 is that no one disputes that section 1110 is a provision through which Congress intended to help airlines; it was, moreover, enacted in the context of general bankruptcy reform designed

to improve the ability of companies, especially public companies, to reorganize. Neither can anyone dispute that now—perhaps more than at any point in this nation's aviation history—airlines desperately need the ability to use chapter 11 to reorganize.

Determination of the issue raised here is critical to the future of the airline industry because its resolution will determine the shape of the industry. Braniff, Eastern and certain small airlines are already gone. Pan Am, Continental Airlines, Midway Airlines and Metro Airlines are all now in chapter 11 and newspaper reports indicate that several other airlines (including T.W.A., Northwest and Hawaiian Air) may seek protection at any time. *See* Nomani, *TWA May Seek Chapter 11 Status, Even in Route Sale*, Wall St. J., Apr. 3, 1991, at A4, col. 3; *Bankruptcy Filing by Metro Airlines*, N.Y. Times, Apr. 2, 1991, at D5, col. 2; Pelline, *Airline Graveyards See Business Taking Off*, San Francisco Chronicle, Apr. 1, 1991, at B1; Poole, *Air Competition Running on Empty*, Chicago Tribune, Mar. 11, 1991, at 13; Greenberg, *The Savvy Traveler: Air Fares May Soar in Not-So-Friendly Skies*, L.A. Times, Mar. 10, 1991, at 2, col. 1; Ziemba, *U.S. Tailspin May Aid Foreign Airlines*, Chicago Tribune, Feb. 17, 1991, at C1; Joyner, *Northwest Asks Unions for Help*, Detroit News, Feb. 3, 1991, at E1; Gellene, *NWA Buys Stake in Hawaiian Air*, L.A. Times, Dec. 11, 1990, at D2, col. 3. Resolution of this issue may determine whether some or all of these carriers live or die.

The Court is unlikely to benefit from further review of this issue by the lower courts. A consensus has clearly developed contrary to the position we advocate on this appeal, including comprehensive opinions by district courts acting as appellate courts in the Second and Third Circuits. The Court of Appeals below obviously thought the issue was sufficiently settled that it did not even choose to write an opinion.

We respectfully submit that these decisions are desperately wrong and are based on a fundamental misinterpretation of some of this Court's recent pronouncements regarding courts'

role in construing statutes. In effect, the courts below, out of deference to blind literalism, have abandoned the traditional judicial function of interpreting statutes to effect Congress' purpose and a consistent and sensible public policy. Absent direction from this Court these decisions will almost certainly be followed. Should this Court delay reviewing this question, the harm to Pan Am and many other similarly situated airlines will simply not be able to be undone.

The scope of section 1110, a question never previously addressed by this Court, is therefore a matter of national importance. The impact of a decision on this issue militates in favor of granting review; the issue is "one of *general* importance [and not] 'in the mere interest of the litigants.' " Harlan, *Manning the Dikes*, 13 Rec. N.Y. City Bar Ass'n 541, 551 (1958) (quoting Chief Justice Hughes). The consequences not only to Pan Am, its approximately 25,000 employees, but also to tne entire airline industry, the finance industry and the traveling public, demonstrate the importance of this issue of federal law.[6]

## B. THE READING OF SECTION 1110 BY THE COURTS BELOW PRODUCES ABSURD RESULTS, CONFLICTS WITH OTHER IMPORTANT GOALS OF THE BANKRUPTCY CODE, AND IGNORES CONGRESS' ADMONITION THAT SECTION 1110 SHOULD BE CONSTRUED NARROWLY

By refusing to read the term "lessor" consistently with Congress' intent, the courts below impermissibly transformed a carefully crafted statute designed to achieve a specific congressional purpose—the facilitation of financing of the acquisition of new equipment—into a wholly irrational statutory scheme that provides windfall benefits to sale-leaseback financiers at the expense of this nation's flagship air carrier and

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6 The acute interest of the airline and finance communities in this issue is shown by the Amicus Curiae briefs filed with the Court below, including one by the American Association of Equipment Lessors, which describes this issue as "of critical importance to the airline industry and to the equipment leasing industry."

other parties in interest in its chapter 11 proceeding. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). *See also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (in interpreting a provision of the Bankruptcy Code, "[s]tatutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . ., or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law") (citation omitted).

The legislative history of the 1978 Bankruptcy Code—consistent with congressional statements of intent with respect to leases and conditional sales dating back to the 1930s—states that security interests which do not arise from an acquisition transaction, *i.e.*, general mortgages, are excluded from section 1110. H.R. Rep. No. 595, 95th Cong., 1st Sess. 240 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6199. The necessary, yet irrational, result of the interpretation of section 1110 adopted by the courts below is that nonacquisition sale-leaseback financiers are given vastly greater protection in the event of an airline bankruptcy than financiers with general mortgages, even though in both cases the financiers are providing working capital funds to the airline.

Neither the courts below, nor the financiers, have offered any reason grounded in the legislative history or otherwise—because none exists—as to why Congress would have wanted to favor so vastly sale-leasebacks over U.C.C. Article 9 financiers. To the contrary, as the legislative history of the statute indicates, Congress did *not* intend or envision this result, but instead intended to limit section 1110 to enumerated

acquisition financiers. For purposes of section 1110, nonacquisition sale-leasebacks and non-purchase money equipment security interests are substantively identical—both are nonacquisition transactions used to generate working capital funds—and the statute should not be distorted to treat these transactions differently.

Preferring one class of secured creditors over another in a manner that serves no enunciated congressional policy violates a fundamental principle of the Bankruptcy Code that similarly situated creditors are treated alike. *See* 5 *Collier on Bankruptcy*, ¶ 1123.01[4] (15th ed. 1990) (it is "a cardinal principle of bankruptcy law . . . that creditors of the same class have a right to equality of treatment"); *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) (the "theme of the Bankruptcy Act is equality of distribution"); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 459 (2d Cir. 1985) ("[t]he guiding premise of the Bankruptcy Code, like its predecessor, the Bankruptcy Act, is the equality of distribution of assets among creditors").

The failure by the courts below to give a narrow construction to section 1110 also conflicts with one of the main purposes of the overall reform of the bankruptcy law when Congress enacted the Bankruptcy Code in 1978 which was to make chapter 11 more available for the reorganization of major public corporations. In interpreting the provisions of chapter 11, courts are required to recognize that "the policy of Chapter 11 is to permit successful rehabilitation of debtors." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). Congress recognized that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Id.* at 528 (citing H.R. Rep. No. 95-595 at 220 (1977)). "By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims and to produce a return for its owners." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983). The automatic stay is central to the Bankruptcy Code's purpose of promoting the reorganization of a debtor:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

*In re Petrusch*, 667 F.2d 297, 299 (2d Cir. 1981) (*per curiam*), *application denied*, 456 U.S. 911, *cert. denied*, 456 U.S. 974 (1982) (quoting the legislative history to the 1978 Bankruptcy Reform Act, H.R. Rep. 95-595, 95th Cong., 2d Sess. 340, *reprinted in* 1978 U.S. Cong. & Admin. News 6135, 6296-97). *See also In re Parr Meadows Racing Ass'n*, 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 869 (1990).

Section 1110 stands in sharp contrast to this rehabilitative regime because it imposes an extremely onerous burden on an airline debtor—a mere sixty days into its reorganization, the airline is required to cure all prepetition defaults and most postpetition defaults relating to its most important physical assets, its aircraft, or it loses the benefit of the automatic stay. In short, section 1110 runs directly counter to the fundamental premise of the Code to provide breathing room to the debtor at the early stages in the bankruptcy proceeding, allowing the debtor time to reorganize. *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990). As stated by commentators:

> [Section 1110 is a] detriment for other creditors, in that assets—either the aircraft or cash—are removed from the debtor's estate and are not available during the reorganization process. This may harm the debtor's cash flow or interfere with its operations during the critical period following the commencement of a chapter 11 case, when the debtor's business is typically in its most precarious state. In addition, to the extent that the aircraft financier thereby receives more (because it takes its full contract rate of payment during reorganization) than it otherwise would (for example, where all other

> secured creditors accept a reduced or stretched out payment in a plan of reorganization), the special provisions result in a net loss to the estate and to other creditors.

Gerstell & Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 4 (1987).[7]

In recognition of the need to maintain a balance between the benefits provided certain financiers and the detriment to the reorganizing entity and its other constituencies, both the Senate and House sponsors of the Bankruptcy Reform Act admonished courts that section 1110 is to be narrowly construed. 124 Cong. Rec. H11,102 (Sept. 28, 1978); S17,419 (Oct. 6, 1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6471, 6540. The District Court wrongly ignored this congressional admonition, stating that "the value of statements in the Congressional Record as barometers of legislative intent is minimal at best." This Court, however, has held that the statements of the congressional sponsors of a bill are entitled to considerable deference. *Regents of Univ. of Calif. v. Public Employment Relations Bd.*, 485 U.S. 589, 595-97 (1988); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982).

Construing section 1110 narrowly, it is clear that it cannot encompass nonacquisition sale-leasebacks. In enacting section 1110, Congress did not intend to favor sale-leaseback financiers over other secured parties who provided nonacquisition

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7 In addition to overriding the automatic stay for the protected class of creditors, the application of section 1110 frees a qualifying creditor from its normal burden of establishing a lack of adequate protection. Section 1110 instead requires that, early on in its reorganization efforts, the debtor must cure defaults or risk losing the equipment, regardless of whether that creditor is otherwise adequately protected. As a result, section 1110 in effect enables a qualifying lender to receive use and occupancy payments in excess of fair market value to the extent its contract rate exceeds the market rate.

financing.[8] Congress also did not intend to make chapter 11 effectively unavailable for the airline industry.

## C. CONGRESS' PURPOSE IN ENACTING SECTION 1110 WAS TO FACILITATE AN AIRLINE'S ACQUISITION OF NEW EQUIPMENT AND NOT TO BENEFIT FINANCIERS OF AN AIRLINE'S EXISTING FLEET

### 1. The Term "Lessor" In Section 1110 Does Not Have A Well Understood Plain Meaning

Whether the "words of a statute are clear is itself not always clear." *United States v. Bonanno Organized Crime Family*, 879 F. 2d 20, 22 (2d Cir. 1989). The term "lease" is inherently ambiguous because it can refer to a variety of arrangements, including "tax leases," "accounting leases" and, for purposes relevant here, economic transactions that produce working capital financing as well as transactions which result in the acquisition of new equipment. The courts below held that yet an additional subcategory of financing leases, those that are not "true" leases, are not covered by section 1110. This holding necessarily defeats any arguments that the rulings below provided any certainty for the financial markets, and also belies any argument that the unadorned statutory words are clear.

As the term is used in section 1110 this ambiguity is pronounced because the term "lessor" is grouped with the words "conditional vendor" and "purchase money equipment security interest," both terms having a single meaning relating solely to new acquisitions. To determine whether the term "lessor" was intended by Congress to include sale-leaseback financiers, the Court must look to the statute as a whole, *Crandon v. United States*, 110 S. Ct. 997, 1001 (1990), and endeavor to interpret the term "lessor" in light of, and consistently with, the other related terms in the statute. *United*

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8 There is a logic to preferring acquisition financiers over other creditors, including other secured creditors, because they force an airline to increase its asset base commensurate with its new obligations. No other creditor is therefore prejudiced by favoring this type of financing.

*States v. American Trucking Ass'ns*, 310 U.S. 534, 545 (1940) ("[A word] takes color from its surroundings and frequently is carefully defined by the statute where it appears."). This principle of common sense construction is known as the doctrine of "*noscitur a sociis*," which provides that the meaning of particular words of a statute may be ascertained by reference to the meaning of words with which they are associated. *See, e.g., Dole v. United Steelworkers of Am.*, 110 S.Ct. 929, 935 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); *California v. Brown*, 479 U.S. 538, 543 (1987); *Garcia v. United States*, 469 U.S. 70 (1984); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979); *Third Nat'l Bank v. Impac., Ltd.*, 432 U.S. 312, 322 (1977); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961).

Where, as here, "the scope of a statutory provision is not made crystal clear by the language of the provision," *Berger v. Heckler*, 771 F.2d 1556, 1557 (2d Cir. 1985), the Court must look to the legislative history to " 'find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.' " *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

Moreover, even if a statute is unambiguous on its face (which Pan Am submits is decidedly not the case here) a court must still look to the statute's purpose as reflected in the legislative history. As this Court has explained:

> When [the plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose rather than the literal words. *When aid to construction of the meaning of*

> *words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on "superficial examination."*

*American Trucking Ass'ns*, 310 U.S. at 543-44 (emphasis added).

As shown herein, an analysis of the history of section 1110 refutes the "plain meaning" ascribed to it by the courts below. That history shows that the word "lease" was introduced in a predecessor statute in 1935, in contemplation of equipment trust financing arrangements and it was this acquisition concept that was carried forward in subsequent enactments. Congress sought to validate an arrangement that was used to permit the financing of new equipment free from the restrictions of after-acquired property clauses in existing indentures. The vehicle for accomplishing this was not, in fact, a "true lease." Moreover, a sale-leaseback was inherently incapable of accomplishing this goal.

In stark contrast to the conclusion of the courts below, the participants in nonacquisition sale-leasebacks in the airline industry have recognized for years the ambiguity in section 1110 with respect to whether it encompassed sale-leasebacks. Numerous articles in trade and legal journals have alerted practitioners that the applicability of section 1110 to sale-leasebacks was, at best, unclear. *See, e.g.*, Goldman, Album & Ward, *Repossessing the Spirit of St. Louis: Expanding the Protection of Sections 1110 and 1168 of the Bankruptcy Code*, 41 Bus. Law. 29, 53-54 (1985) (concluding that section 1110 does not encompass nonacquisition sale-leasebacks). As two commentators poignantly noted, section 1110 is "not without its ambiguities . . . its complexity sometimes fosters confusion and obscures the purpose that Congress intended. . . . The section is not a model of statutory drafting. Its flaws are both syntactical and logical." Giddens and Schick, *Section 1110 of the Bankruptcy Code: Time for Refueling?*, 6 Am. Bankr. L.J. 109, 111, 131 (1990).

Evidence that section 1110 did not have a plainly understood meaning is further provided by 1933 Securities Act prospectuses containing public disclosure concerning the applicability of section 1110 of the Bankruptcy Code. For example, one such prospectus stated

> [t]here are few cases interpreting section 1110, and certain writers believe that it is not clear whether section 1110 applies to a transaction involving aircraft equipment already owned by a certified airline, or whether it applies only to transactions involving new equipment or equipment 'new' to the airline. . . . [T]he Partnership may acquire and lease Aircraft which are already owned by airlines in 'sale-leaseback' transactions, and may not under such circumstances be entitled to the benefits of section 1110.

Polaris Aircraft Income Fund IV, Prospectus at 46-47 (Oct. 15, 1987).

**2. The Legislative History Of Section 1110 And Its Predecessor Provisions Clearly Demonstrates Congress' Purpose To Facilitate The Acquisition Of New Equipment By Airlines**

Congress has consistently made it clear that section 1110 was designed to encourage the availability of financing for the acquisition of new equipment and, accordingly, limited its applicability to the types of acquisition financings prominent in the industry. *See generally* Goldman, Album & Ward, *supra*, at 38-39. Section 1110's historical roots are traceable to the 1935 enactment of section 77(j) of the old Bankruptcy Act.[9] This amendment created limited bankruptcy exceptions in railroad reorganization cases designed to benefit certain transactions then used for acquisition financing in the railroad industry. Congress has since extended these protections twice to other industries (the airline industry in 1957 and the

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9 *See* 5 King, *Collier on Bankruptcy*, ¶ 1110.01, at 1110-3 (15th ed. 1990) ("Sections 1110 and 1168 should be compared with Sections 77(j), 116(5) and 116(6) of the Bankruptcy Act . . . .").

water carrier industry in 1968) and preserved and modernized the provision when it enacted the 1978 Bankruptcy Code. The common thread running through all of these congressional enactments, as reflected in both the language of the statutes and legislative history, is that the section was designed to encourage investment in new equipment to airlines—not to provide windfall benefits to financiers who, like the sale-leaseback financiers, merely provide working capital funds to airlines.

**a. The 1935 Amendment To Section 77 Of The Bankruptcy Act Provided An Exception For The Common Acquisition Financing Transactions Of That Period**

In the 1930s, the two primary forms of acquisition financings in the railroad industry were conditional sales and leases. These financing mechanisms developed as a means of avoiding the effect of after-acquired property clauses, which provided that property acquired by the borrower subsequent to the granting of a general mortgage become subject to that preexisting mortgage. Since conditional sales and leases allowed title to remain with the acquisition financier rather than passing to the railroad, the rolling stock would not be subject to the after-acquired property clause. *See generally* 2 Gilmore, *Security Interests in Personal Property*, § 28.2 (1965). As emphasized by Professor Gilmore, only transactions that promoted the acquisition of property, however, were protected from an after-acquired property clause contained in preexisting liens. *Id.* at 750 ("To rank as purchase money, a claim must be, it was often said, 'directly' related to the acquisition of property."). Not only were sale-leasebacks not in general use at that time but they would not have served the purpose of escaping an after-acquired property clause. Property already subject to such clauses would not be newly financeable by a sale-leaseback transaction because the proceeds from the sale portion of the transaction would be required to be applied to the preexisting debt.

In the wake of the Great Depression, Congress amended section 77 of the Bankruptcy Act to facilitate railroads' ability to re-equip themselves with modern equipment. Prior to that amendment, section 77 had permitted federal courts to stay any suit affecting a railroad organization, and courts were empowered to prevent conditional sellers or lessors of rolling stock from repossessing that rolling stock from a railroad in reorganization. To remedy that situation, and thereby encourage acquisition financings, Congress provided that the conditional sales and leases would receive special protections in bankruptcy.

Thus, amended section 77(j) provided in relevant part that:

> The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any such right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

41 Stat., 74th Cong., 1st Sess. § 77(j) at 922 (1935). Because at that time the means by which acquisition financiers escaped the effects of an after-acquired property clause depended on the financiers' retention of title in the equipment, the statute provided that the Bankruptcy Act affected neither the acquisition financier's title nor its right to take possession of the property.

The House Report accompanying the statute makes it absolutely clear that the section was intended to benefit only acquisition financiers:

> Under the present provisions of section 77, there is doubt whether the trustee under the typical equipment-trust agreement is entitled to the possession of the property insured by the terms of the agreements, it having been urged in some of the pending cases that, under the provisions of section 77, the equipment-trust arrangement must be treated as an ordinary mortgage. *If this were done, the investors in the trusts would, conse-*

> *quently, be deprived of the preference intended to be preserved to them by the terms of the agreements, which in form and substance are generally in the nature of contracts of conditional sale. In view of the necessity of readily financing purchases of equipment at a time when the development of the transportation art is providing new forms of equipment*, particularly in the passenger field, of which, in interests of efficiency and economy, the carriers should be able to avail themselves, *and because after a depression the carriers are usually required to make large expenditures for equipment* in order to accommodate the improved traffic, your committee is of the opinion that any doubt should be removed with reference to the validity of the equipment trust *as a means of financing equipment purchases*. Consequently H.R. 8507 carries an amendment in subsection (j) under which the title of any owner to equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property, shall not be adversely affected by the provisions of the section.

H.R. Rep. No. 1283, 74th Cong., 1st Sess. 4 (1935) (the "1935 House Report") (emphasis added).

As Justice Cardozo wrote: The words "came into the statute . . . freighted with the meaning imparted to them by the mischief to be remedied." *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 220-21 (1936). In section 77(j), the "mischief to be remedied" was the difficulty faced by railroads in financing new acquisitions of equipment following the depression. Accordingly, "[i]n view of the necessity of readily financing purchases of equipment," the statute was designed to remove any doubt as to the validity of the equipment trust as a means of financing equipment purchases, and thus to ensure that equipment acquisition financiers would receive the priority to which they were entitled and would be entitled to repossess their equipment in the event of the railroad's bankruptcy. *Zirn v. Hanover Bank*, 215 F.2d 63, 68-69 (2d Cir. 1954) (rejecting argument that approval of the

Interstate Commerce Commission was required before repossession because such a requirement would prevent railroads from "procur[ing] needed equipment"). As stated by Judge Henry J. Friendly, this section was added in 1935 "because of the present and prospective needs of the railroads for large quantities of new type cars and motor power to replace obsolescent equipment." Friendly, *Amendment of Railroad Reorganization Act*, 36 Colum. L. Rev. 27, 43 (1936).

**b. The 1957 Airline Legislation**

In 1957, Congress enacted section 116(5), the predecessor to section 1110, affording to financiers of new equipment for air carriers the same protection it had previously afforded to financiers of new railroad equipment.[10] The House Report emphasized that, as with the previous railroad legislation, Congress' intent was to provide special benefits in bankruptcy to acquisition financiers:

> Many of the Nation's smaller airlines are today facing serious financing problems resulting from *the need to replace obsolete equipment with modern aircraft*. Only in this way can these lines properly meet the heavy

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10 Section 116(5) provided:

> Notwithstanding any other provisions of chapter X, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances, and spare parts (as any of such are defined in the Civil Aeronautics Act of 1938, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any air carrier which is operating pursuant to a certificate of convenience and necessity issued by the Civil Aeronautics Board, and any right of such owner or of any other lessor to such air carrier to take possession of any such property in compliance with the provisions of such lease or conditional sale contract shall not be affected by the provisions of Chapter X if the terms of such lease or conditional sale so provide.

Just as with the railroad legislation, because the retention of title was at that time fundamental to an acquisition financiers' ability to escape a prior lien's after-acquired property clause, the statute provided that the Bankruptcy Act did not affect the financiers' right to title or to repossess the property.

> demands of increased air travel and at the same time attain a sound financial condition which would obviate the need for continued subsidy.

H.R. Rep. No. 944, 85th Cong., 1st Sess. 1, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926 (emphasis added) (the "1957 House Report"). Congress hoped to facilitate air carriers' acquisition of new equipment by making it easier for them to obtain conditional sales and leases—again, the types of acquisition financing prevalent at that time. Thus, the 1957 House Report further stated that:

> Testimony before the Bankruptcy Subcommittee of this committee indicated that the smaller lines are presently unable to attract the capital necessary for their *current reequipment requirements.* Testimony also indicated that the enactment of this bill would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions. The reason for this is the greater security afforded conditional sales vendors and lessors by the amendment to chapter X made in this bill.

*Id.* at 1926 (emphasis added).

The 1957 House Report concluded by noting that:

> [I]n the event of default, the right of these creditors to take possession would be preserved. *This would establish an exception similar to that now accorded to rolling stock of railroads under section 77j. It is contemplated that the enactment of this bill will result in extensive use of equipment trust financing as the financial basis for a major reequipment program.*

*Id.* at 1927 (emphasis added). Significantly, there is nothing whatsoever in the legislative history of section 116(5) indicating that Congress ever intended to provide that section's benefits to financing parties who merely enabled the air carrier to obtain general working capital funds, such as sale-leaseback financiers, as opposed to financiers who directly financed the airline's acquisition of new equipment.

Nonetheless, the courts below relied on one sentence drawn out of context from the 1957 House Report to reach the strained conclusion that section 116(5) was broadly designed to increase the availability of capital to airlines in general. The entire House Report and even the paragraph from which that sentence was wrested, however, make it clear that the "capital" referred to in the quoted sentence is the "capital necessary for [airlines'] current reequipment requirements," not the working capital provided by sale-leasebacks. 1957 House Report at 1926. Moreover, the sentence relied on clearly is referring to "interest" being charged pursuant to an equipment trust arrangement, and not rent, which would be associated with a lease. In short, the 1957 legislation for airlines, like the 1935 legislation for railroads, was designed to provide special benefits in bankruptcy solely to acquisition financiers to encourage them to finance new equipment.

### c. In The 1978 Legislation Enacting Section 1110 Congress Preserved And Reemphasized The Existing Limitation That The Statute Was Only Applicable To Acquisition Transactions

When Congress enacted the Bankruptcy Code in 1978, it carried forward and amended section 116(5) of the Bankruptcy Act, recodifying it as section 1110. Section 1110 contained several changes from prior law. First, the intent of the parties as expressed in their financing documentation and the possession of title by the financier were both eliminated from the new section as requirements for coverage. Second, a limitation was placed on the jurisdictional power of the Bankruptcy Court to extend the cure period beyond sixty days—for the first time giving sharp teeth to the provision.[11]

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11 Although sections 77(j) and 115(6) would appear to have been more favorable to financiers than section 1110, in practice courts often used their equitable powers to override those sections and to enjoin financiers from repossessing collateral. *See, e.g., In re Penn Cent. Transp. Co.*, 402 F. Supp. 127 (E.D. Pa. 1975); *In re Erie Lackawanna Ry.*, No. 75-2446 (N.D. Ohio 1975) (unreported decision). Numerous commentators have concluded that section 1110 was devised to provide

Finally, purchase money equipment security interests were included within the coverage of the provision in order to make the statute available for more modern and flexible security devices. The 1977 House Report spells out the rationale for these changes:

> *An attempt was made to preserve the limitations on the right of the financier contained in current law.* However, certain changes were made. First, the proposed sections provide protection for equipment security interests. *The term includes only security interests that were granted to finance the acquisition of the covered equipment. A general mortgage is excluded.* Under present law, the protection applies only to leases and conditional sales of equipment. The theory behind the present limitation is that under leases and conditional sales, title of the property does not pass to the debtor but remains in the financier. Thus, it is appropriate to exclude what is not property of the estate from the automatic stay in a reorganization case.
>
> Changes in financing practices and in the bankruptcy laws have suggested that the former limitation be deleted, and that the protection be expanded to cover equipment security interests. Since the adoption of the original sections, there has been universal adoption of Article 9 of the Uniform Commercial Code, which abolishes conditional sale contracts, and substitutes security agreements and security interests instead. Changes in the bankruptcy laws provide similar restraints for lessors of property to the debtor as exist for mortgages or secured creditors, Indeed, the Uniform Commercial Code acknowledges that some leases are merely disguised secu-

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greater guarantees to equipment financiers of their repossession rights, by providing that those rights were not affected by the automatic stay or by the court's equitable powers to issue injunctions. *See* Giddens & Schick, *supra* at 118; Goldman, Album & Ward, *supra*, at 42 (1985); 5 King, *Collier on Bankruptcy* ¶ 1110.01[6][c], at 1110-23 (15th ed. 1990).

> rity agreements, and directs that they be so treated. Because retention of the prior limitation would unnecessarily force equipment financing transactions into outmoded forms, protection of security interests was added to make financing forms more flexible and more consonant with modern law.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 238-41 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6199-6200 (emphasis added). Similarly, the 1978 Senate Report emphasized that the legislation was intended to "preserve[ ] the protection" previously afforded to "lessors and conditional vendors"—not to expand them. S. Rep. No. 989, 95th Cong., 2d Sess. 116, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5902 (the "1978 Senate Report").

* * *

Accordingly, the legislative history is crystal clear that Congress never intended to provide special protection to anything other than acquisition financing. Moreover, Congress also expressed a consistent intent to avoid wholly depriving airlines of the benefits of reorganization proceedings by excluding general mortgages (which could affect a substantial portion of an existing fleet).

Congress did not anticipate the advent of a tremendous volume of sales-leaseback financing. Nor did Congress anticipate that sale-leaseback financiers would argue for an interpretation of section 1110 that would thoroughly undermine its careful balancing of interests. Congress' failure to draft section 1110 to deal more clearly with problems it did not expect cannot, however, justify a result that is clearly contrary to what Congress intended.

It is the traditional and proper role of courts to interpret statutes to effectuate the will of the Congress and to achieve a sensible public policy. In the words of Judge Learned Hand

> it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose

> or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

*Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

## CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

Dated: April 4, 1991

Respectfully submitted,

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# APPENDICES

## APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 91-5023

Filed April 2, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of April one thousand nine hundred and ninety-one.

Present: HON. J. EDWARD LUMBARD,
HON. RALPH K. WINTER,
HON. JOHN M. WALKER, JR.,
Circuit Judges,

IN RE: PAN AMERICAN CORPORATION; PAN AMERICAN WORLD AIRWAYS, INC.: PAN AMERICAN SHUTTLE, INCORPORATED; PAN AM EXPRESS; PAA CORPORATION; ALLMAT INTERNATIONAL INCORPORATED; ALERT MANAGEMENT SYSTEMS, INCORPORATED; PAN AMERICAN COMMERCIAL SERVICES, INCORPORATED,

*Debtor*,

SECTION 1110 PARTIES; OMNIBUS SECTION 1110 PARTIES; PS GROUP, INC.; GRAND CENTRAL PARTNERS NO. 1; GRAND CENTRAL PARTNERS NO. 2; GRAND CENTRAL PARTNERS NO. 3; UNITED STATES AIRLEASE, INC.; CL AIRCRAFT VII, INC; C.I.T. LEASING CORPORATION; THE CIT GROUP/EQUIPMENT FINANCING, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, as indenture trustee; NMB LEASE NV; ORIX CORPORATION; NISSHO

IWAI CORPORATION; C. ITOH 7 CO., LTD; CITIBANK, N.A.; CITICORP NORTH AMERICA, INC., formerly doing business as Citicorp Industrial Credit, Inc.; DE NATIONALE INVESTERINGSBANK N.V.; GREYHOUND FINANCIAL CORPORATION; PK FINANS INTERNATIONAL CORPORATION; WESTINGHOUSE CREDIT CORPORATION; AERON AVIATION CORPORATION; IBJ SCHROEDER LEASING CORPORATION; U.S. CONCORD, INC.; LDI FINANCIAL SERVICERS CORPORATION; PLC LEASING CORPORATION; PROGRESS LEASING CORPORATION; BRITISH AEROSPACE, INC.; JET ACCEPTANCE CORPORATION; ROLLS ROYCE CREDIT CORPORATION; ROLLS ROYCE HOLDINGS, INC.: AVIONS DE TRANSPORT REGIONAL G.I.E., on behalf of itself and Wilmington Trust Company; NEW ENGLAND MERCHANT LEASING CORPORATION; MANHATTAN BAIL, G.I.E.; THE CONNECTICUT NATIONAL BANK; WESTINGHOUSE CREDIT CORPORATION; MANHATTAN LEASE, G.I.E.; CHRYSLER CAPITAL CORPORATION; BARCLAYS BANK; THE CONNECTICUT NATIONAL BANK AND TRUST COMPANY, N.A.; PACIFIC HARBOR CAPITAL INC.; G.M. AVIATION SERVICES S.A.; UNIBANK A/S, NEW YORK BRANCH; INTEGRATED AIRCRAFT CORPORATION; NATIONAL WESTMINSTER BANK; INTEGRATED AIRCRAFT CORPORATION; AERONAUTICS FOUR-SEVEN A, INC.; AERONAUTICS I, INC.; THE BANK OF NEW YORK, as Trustee; EVERGREEN INTERNATIONAL AIRLINES, INC.; EVERGREEN VENTURE, INC.; COBBLESTONE CORPORATION; WILMINGTON TRUST COMPANY; GENERAL ELECTRIC CAPITAL CORPORATION; OFFICIAL UNSECURED CREDITORS COMMITTEE; UNITED AVIATION SERVICES; WELLS FARGO BANK NATIONAL ASSOCIATION,

*Respondents-Appellees*,

—v.—

PAN AMERICAN CORPORATION,

*Debtor-Appellant*.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

Further ordered that the stay pending appeal will be extended until noon, April 5, 1991, in order to allow appellants to seek temporary relief from the Supreme Court. It shall thereafter expire.

Elaine B. Goldsmith,
Clerk

/s/ EDWARD J. GUARDARO
by: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1519—August Term, 1990

(Argued: April 2, 1991 Decided: April 2, 1991)

Docket No. 91-5023

IN RE: PAN AMERICAN CORPORATION; PAN AMERICAN WORLD AIRWAYS, INC.; PAN AMERICAN SHUTTLE, INCORPORATED; PAN AM EXPRESS; PAA CORPORATION; ALLMAT INTERNATIONAL, INCORPORATED; ALERT MANAGEMENT SYSTEMS, INCORPORATED; PAN AMERICAN COMMERCIAL SERVICES, INCORPORATED,

*Debtor*,

SECTION 1110 PARTIES; OMNIBUS SECTION 1110 PARTIES; PS GROUP, INC.; GRAND CENTRAL PARTNERS NO. 1; GRAND CENTRAL PARTNERS NO. 2; GRAND CENTRAL PARTNERS NO. 3; UNITED STATES AIRLEASE, INC.; CL AIRCRAFT VII, INC; C.I.T. LEASING CORPORATION; THE CIT GROUP/EQUIPMENT FINANCING, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, as indenture trustee; NMB LEASE NV; ORIX CORPORATION; NISSHO IWAI CORPORATION; C. ITOH 7 CO., LTD; CITIBANK, N.A.; CITICORP NORTH AMERICA, INC., formerly doing business as Citicorp Industrial Credit, Inc.; DE NATIONALE INVESTERINGSBANK N.V.; GREYHOUND FINANCIAL CORPORATION; PK FINANS INTERNATIONAL CORPORATION; WESTINGHOUSE CREDIT CORPORATION; AERON AVIATION CORPORATION; IBJ SCHROEDER LEASING CORPORATION; U.S. CONCORD, INC.; LDI FINANCIAL SERVICERS CORPORATION; PLC LEASING CORPORATION; PROGRESS LEASING CORPORATION; BRITISH AEROSPACE, INC.; JET ACCEPTANCE CORPORATION; ROLLS ROYCE CREDIT CORPORATION; ROLLS

ROYCE HOLDINGS, INC.; AVIONS DE TRANSPORT REGIONAL G.I.E., on behalf of itself and Wilmington Trust Company; NEW ENGLAND MERCHANT LEASING CORPORATION; MANHATTAN BAIL, G.I.E.; THE CONNECTICUT NATIONAL BANK; WESTINGHOUSE CREDIT CORPORATION; MANHATTAN LEASE, G.I.E.; CHRYSLER CAPITAL CORPORATION; BARCLAYS BANK; THE CONNECTICUT NATIONAL BANK AND TRUST COMPANY, N.A.; PACIFIC HARBOR CAPITAL INC.; G.M. AVIATION SERVICES S.A.; UNIBANK A/S, NEW YORK BRANCH; INTEGRATED AIRCRAFT CORPORATION; NATIONAL WESTMINSTER BANK; INTEGRATED AIRCRAFT CORPORATION; AERONAUTICS FOUR-SEVEN A, INC.; AERONAUTICS I, INC.; THE BANK OF NEW YORK, as Trustee; EVERGREEN INTERNATIONAL AIRLINES, INC.; EVERGREEN VENTURE, INC.; COBBLESTONE CORPORATION; WILMINGTON TRUST COMPANY; GENERAL ELECTRIC CAPITAL CORPORATION; OFFICIAL UNSECURED CREDITORS COMMITTEE; UNITED AVIATION SERVICES; WELLS FARGO BANK NATIONAL ASSOCIATION,

*Respondents-Appellees*,

—v.—

PAN AMERICAN CORPORATION,

*Debtor-Appellant*.

---

Before:

LUMBARD, WINTER, and WALKER,

*Circuit Judges*.

---

Appeal from a judgment of the United States District Court for the Southern District of New York (Michael B. Mukasey, *Judge*) affirming the bankruptcy court's ruling that lessors' actions to recover airplanes and equipment leased to Pan Am pursuant to certain sale-leaseback transactions may

be exempted from the automatic stay by operation of Section 1110 of the Bankruptcy Code.

Affirmed.

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JEROME E. HYMAN, New York, New York (Thomas J. Moloney, Robert P. Davis, Howard S. Zelbō, James L. Bromley, Shari Siegel, Jean E. Kalicki, Cleary, Gottlieb, Steen & Hamilton, New York, New York, of counsel), *for Debtors in Possession-Appellants.*

MARVIN E. JACOB, New York, New York (Bruce R. Zirinsky, Bruce N. Shortt, Stephanie R. Schwartz, Gordon W. Johnson, Steve Levitan, Kurt Bjorklund, Weil, Gotshal & Manges, New York, New York, Jon Yard Arnason, John J. Reilly, Alan Heblack, Andrea Fischer, Haight, Gardner, Poor & Havens, New York, New York, James W. Giddens, David LeMay, Hughes, Hubbard & Reed, New York, New York, John I. Karesh, Jill Levi, Feltman, Karesh, Major & Farbman, New York, New York, of counsel), *for Appellees General Electric Capital Corporation, Wilmington Trust Company, Owner Trustee, Evergreen International Airlines, Inc., Cobblestone Corporation, U.S. Concord, Inc., IBJ Schroder Leasing Corporation, Greyhound Financial Corporation De Nationale Investeringsbank N.V., Credit Lyonnais/PK AIRFINANCE and Aeron Aviation, Inc.*

MIKE O. SIGAL, JR., New York, New York (Brian Trust, Daniel J. Sullivan, Simpson, Thatcher & Bartlett, New York, New York, Stephen H. Gross, Alan Kanzer, Walter

Conston Alexander & Green, New York, New York, Kathrine A. McLendon, King & Spaulding, Atlanta, Georgia, Michael Havers, Perkins Coie, Seattle, Washington, Eloise L. Morgan, Robert Gray, Winthrop, Stimson, Putnam & Roberts, New York, New York, Steven J. Howell, Honigman Miller, Schwartz & Cohn, Detroit, Michigan, of counsel), *for Appellees C.I.T. Leasing Corporation, The CIT Group/ Equipment Financing, Inc., PS Group, Inc., Grand Central Partners Nos. 1-3, United States Airlease, Inc., Airlease Ltd., CL Aircraft VII, Inc., British Aerospace, Inc., Jet Acceptance Corporation, Pacific Harbour Capital, Inc., Four-Seven A, Inc., Aeronautics I, Inc., The Bank of New York, as Trustee.*

WILLIAM C. CLARKE, New York, New York (William R. Brennan, Lord Day & Lord, New York, New York, of counsel), *for Amici Curiae America West Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc., USAir, Inc.*

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BENNETT BOSKEY, Washington, D.C. (Ellis Lyons, Edward A. Groobert, Morris Klein, Volpe, Boskey and Lyons, Washington, D.C., of counsel), *for Amicus Curiae American Association of Equipment Lessors.*

PER CURIAM:

Debtors in possession Pan Am Corporation, *et al.*, appeal from an order affirming the bankruptcy court's ruling that lessors' actions to recover airplanes and equipment leased to Pan Am in certain sale-leaseback transactions may be exempted from the automatic stay by operation of Section 1110 of the Bankruptcy Code. *See* 11 U.S.C. § 1110 (1988). We now affirm the district court's order for substantially the reasons stated by Judge Mukasey. *See In re Pan Am Corporation*, ____ B.R. ____, 1991 WL 38056 (S.D.N.Y. Mar. 18, 1991).

The stay pending appeal will be extended until noon, April 5, 1991, in order to allow appellants to seek temporary relief from the Supreme Court. It shall thereafter expire.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 91-5023

Filed: April 3, 1991

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of April one thousand nine hundred and ninety-one.

IN RE: PAN AMERICAN CORPORATION; PAN AMERICAN WORLD AIRWAYS, INC.; PAN AMERICAN SHUTTLE, INCORPORATED; PAN AM EXPRESS; PAA CORPORATION; ALLMAT INTERNATIONAL, INCORPORATED; ALERT MANAGEMENT SYSTEMS, INCORPORATED; PAN AMERICAN COMMERCIAL SERVICES, INCORPORATED,

*Debtor*,

SECTION 1110 PARTIES; OMNIBUS SECTION 1110 PARTIES; PS GROUP, INC.; GRAND CENTRAL PARTNERS NO. 1; GRAND CENTRAL PARTNERS NO. 2; GRAND CENTRAL PARTNERS NO. 3; UNITED STATES AIRLEASE, INC.; CL AIRCRAFT VII, INC; C.I.T. LEASING CORPORATION; THE CIT GROUP/EQUIPMENT FINANCING, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, as indenture trustee; NMB LEASE NV; ORIX CORPORATION; NISSHO IWAI CORPORATION; C. ITOH 7 CO., LTD; CITIBANK, N.A.; CITICORP NORTH AMERICA, INC., formerly doing business as Citicorp Industrial Credit, Inc.; DE NATIONALE INVESTERINGSBANK N.V.; GREYHOUND FINANCIAL CORPORATION; PK FINANS INTERNATIONAL CORPORATION; WESTINGHOUSE CREDIT CORPORATION; AERON AVIATION CORPORATION; IBJ SCHROEDER

LEASING CORPORATION; U.S. CONCORD, INC.; LDI FINANCIAL SERVICERS CORPORATION; PLC LEASING CORPORATION; PROGRESS LEASING CORPORATION; BRITISH AEROSPACE, INC.; JET ACCEPTANCE CORPORATION; ROLLS ROYCE CREDIT CORPORATION; ROLLS ROYCE HOLDINGS, INC.; AVIONS DE TRANSPORT REGIONAL G.I.E., on behalf of itself and Wilmington Trust Company; NEW ENGLAND MERCHANT LEASING CORPORATION; MANHATTAN BAIL, G.I.E.; THE CONNECTICUT NATIONAL BANK; WESTINGHOUSE CREDIT CORPORATION; MANHATTAN LEASE, G.I.E.; CHRYSLER CAPITAL CORPORATION; BARCLAYS BANK; THE CONNECTICUT NATIONAL BANK AND TRUST COMPANY, N.A.; PACIFIC HARBOR CAPITAL INC.; G.M. AVIATION SERVICES S.A.; UNIBANK A/S, NEW YORK BRANCH; INTEGRATED AIRCRAFT CORPORATION; NATIONAL WESTMINSTER BANK; INTEGRATED AIRCRAFT CORPORATION; AERONAUTICS FOUR-SEVEN A, INC.; AERONAUTICS I, INC.; THE BANK OF NEW YORK, as Trustee; EVERGREEN INTERNATIONAL AIRLINES, INC.; EVERGREEN VENTURE, INC.; COBBLESTONE CORPORATION; WILMINGTON TRUST COMPANY; GENERAL ELECTRIC CAPITAL CORPORATION; OFFICIAL UNSECURED CREDITORS COMMITTEE; UNITED AVIATION SERVICES; WELLS FARGO BANK NATIONAL ASSOCIATION,

*Respondents-Appellees*,

—v.—

PAN AMERICAN CORPORATION,

*Debtor-Appellant*.

It is now hereby ORDERED that the mandate in this case will issue at noon on Friday, April 5, 1991.

/s/ J. EDWARD LUMBARD
HON. J. EDWARD LUMBARD, U.S.C.J.
per RKW

/s/ RALPH K. WINTER
HON. RALPH K. WINTER, U.S.C.J.

/s/ JOHN M. WALKER, JR.
HON. JOHN M. WALKER, JR., U.S.C.J.
per RKW

## APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

91 Civ. 1659 (MBM)

In Re

PAN AM CORPORATION, *et al.*,

*Debtors.*

## OPINION AND ORDER

APPEARANCES:

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MICHAEL B. MUKASEY, U.S.D.J.

Pan Am Corporation, *et al.*, debtors and debtors in possession (collectively "Pan Am") filed a petition for reorganization under Chapter 11 of the Bankruptcy Code (the "Code") on January 8, 1991. On February 22, 1991, Pan Am moved in the Bankruptcy Court for the Southern District of New York, by order to show cause, for an order authorizing it to cure defaults in certain transactions pursuant to § 1110 of the Code and declaring that certain other transactions are not covered by § 1110. After notice, and a hearing on March 7, 1991, the Bankruptcy Court, Hon. Cornelius Blackshear, Bankruptcy Judge, issued an opinion from the bench and entered a written order dated March 8, 1991, granting in part and denying in part Pan Am's motion, and reserving decision on unresolved issues—in particular whether certain leases were actually loan transactions rather than true leases. Pan Am has informed this court, by letter dated March 11, 1991,

that it is appealing the following dispositions contained in Judge Blackshear's March 8 order:

*Order ¶ 5*: "Transactions designated by Debtors as 'nonacquisition sale/leaseback transactions' are not disqualified from the protection of Section 1110 solely because they are 'nonacquisition sale/leaseback transactions.' "

*Order ¶ 8*: "The liens in favor of General Electric Capital Corporation ("GECC") securing the Debtors' obligations arising under the 1985 loans described in paragraphs 18-25 of the Declaration [of Joan Fabio, Assistant Treasurer of Pan American World Airways, Inc.] are purchase money security interests entitled to the protection of Section 1110 of the Code to the extent of the outstanding balance of the 1985 loans, to the extent GECC can identify the amount of the debt and the Aircraft and/or Equipment to which it relates."

At a hearing on March 8, 1991, this court denied Pan Am's request for a stay pending appeal of Judge Blackshear's order, but agreed to decide on an expedited basis the appeal of the sale-leaseback issue arising from paragraph 5 of the Bankruptcy Court's order.[1] This opinion relates only to that issue. A later decision will resolve the GECC purchase-money equipment security issue arising from paragraph 8 of the Bankruptcy Court's order. For the reasons set forth below, paragraph 5 of the order, determining that sale-leaseback transactions are within § 1110, is affirmed.

## I.

Section 1110 of the Bankruptcy Code provides in relevant part:

> (a) The right of a secured party with a purchase-money equipment security interest in, or a lessor or conditional

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1 Subsequently, Pan Am appealed this court's denial of a stay to the Court of Appeals for the Second Circuit. By order dated March 12, 1991, the Hon. Jon O. Newman, Circuit Judge, granted Pan Am's request for a stay, pending hearing and disposition of the stay motion before a full panel on March 19,1991.

seller of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 101 of the Federal Aviation Act of 1958, . . . that are subject to a purchase money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board . . . to take possession of such equipment in compliance with the provisions of a purchase money equipment security agreement, lease, or conditional sale contract, . . . is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—

(1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and

(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

(A) that occurred before such date is cured before the expiration of such 60-day period; and

(B) that occurs after such date is cured before the latter of—(i) 30 days after the date of such default; and (ii) the expiration of such 60-day period.

. . . .

11 U.S.C. § 1110 (1991).

As mentioned, the only issue on this expedited appeal is whether the term "lessor" includes those lessors that acquired such status in "non-acquisition sale/leaseback transactions." Pan Am argues that Congress intended the statute to apply only in circumstances where a lessor leases aircraft and related equipment which are new to the airline. Therefore, Pan-Am contends that "lessor" as used in § 1110 actually means "lessor of newly acquired equipment." The

challenged sale-leaseback transactions are described in Exhibit A of the February 22, 1991 "Declaration of Joan Fabio in Support of Debtors' Motion . . ." ("Fabio Decl."). The challenged leases and subleases involve approximately 29 assorted aircraft, including commuter planes operated by Pan Am Express, Inc., and one lease involving two Pratt & Whitney aircraft engines leased by Pan Am Express. If these lease transactions are outside the reach of § 1110, Pan Am will avoid the burden of curing approximately $33 million in pre- and post-petition defaults now existing with respect to those transactions. Fabio Decl., ¶ 2(b). Pan Am concedes for present purposes that § 1110 covers acquisition of any equipment new to the airline, even used equipment. Debtors' Memorandum of Law at 13, n.2.

The lessors involved in the challenged sale-leaseback transactions contend that "lessor," as used in § 1110, unambiguously applies to any true lessor, and that the legislative history does not indicate that the leased equipment must be new to the airline—at least with the clarity required to edit a statute. This dispute presents a straightforward problem of statutory interpretation.

II.

That straightforward problem is itself to be resolved by applying equally straightforward principles of statutory interpretation:

> "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' "

*United States* v. *Ron Pair Enterprises. Inc.*, 109 S.Ct. 1026, 1031 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (brackets in original). *See also Demarest* v. *Manspeaker*, 111 S.Ct. 599, 604 (1991); *In re Chateaugay Corp.*, 920 F.2d 183, 184 (2d Cir. 1990).

This basic rule of statutory construction has been applied to interpret the very statute at issue here, § 1110. *In re Air Vermont*, 761 F.2d 130, 134 (2d Cir. 1985) ("[where] the statute is unambiguous on its face . . . the statute's literal meaning must be applied" unless "there is something to make plain the intent of Congress that the letter of the statute is not to prevail"). *In Air Vermont*, the Second Circuit, noting that "the statute's literal meaning must be applied," reversed an order of the bankruptcy court which read into § 1110 an additional, unstated statutory requirement that a conditional seller perfect its security interest by filing its contract with the Federal Aviation Administration. *Id.* at 134.

These principles of statutory construction do not call simply for a mechanical application of what some call "the plain meaning rule." Rather, courts may and should examine legislative history to determine a statute's purpose and then apply that purpose, if the plain meaning produces an "unreasonable" result "*plainly* at variance with the policy of the legislation as a whole . . . ." *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940) (emphasis added). *See also Korea Shipping Association v. New York Shipping Ass'n*, 880 F.2d 1531, 1537 (2d Cir. 1990) (declining to adopt dictionary meaning of "employer" under 29 U.S.C § 1381(a) (ERISA) where that result would make multi-employer pension plans "victims of the *precise* threat Congress aimed to shield them from") (emphasis added). However, a court may not use its review of the legislative history to rewrite a statute merely because the court disagrees with the manner Congress chose to further its policy. *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 376 (1986).

On its face, the statute is unambiguous. To the extent a party is a true lessor and otherwise qualifies under the statute, it is entitled to the "extraordinary protection" of § 1110. *Vermont*, 761 F.2d at 132. The terms "lessor," "leased" and "lease" are not modified in any way which suggests that the statute was not meant to apply to lessors in a sale-leaseback transaction. The one phrase of § 1110 which does modify the term "lessor"—"whether as trustee or otherwise"—is expansive, rather than restrictive. Therefore, by its terms, the stat-

ute protects all "lessors," and courts should not impose the additional requirement that the lease also involve equipment new to the airline, unless the literal result would be "demonstrably at odds with the intention" of Congress. *Ron Pair Enterprises*, 109 S.Ct. at 1031.

As thoroughly discussed in *In re Braniff, Inc.*, 110 B.R. 980, 983 (Bankr. M.D. Fla. 1990), the legislative history fails to demonstrate that Congress intended § 1110 to apply only to lessors of newly acquired equipment—at least with the level of clarity required for a court to edit a statute. Although the holding in that case may be somewhat limited by the court's reference to the debtor's status as a newly formed airline, an independent reading of the legislative history demonstrates that Congress did not "make plain [an] intent" to impose an acquisition element to lease transactions covered by § 1110, contrary to the "letter of the statute," which has no such element. *Vermont*, 761 F.2d at 134.

The immediate predecessor statute of § 1110 was § 116(5) of the Bankruptcy Act.[2] That statute, which was enacted in 1957, exempted "any owner" and "any other lessor" of equipment "leased, subleased or conditionally sold" to an airline from the provisions of chapter X of the Act. Section 116(5) of the Act in turn was based on an amendment to § 77(j), enacted in 1935, which earlier had given similar protection to "any owner, whether as trustee or otherwise, [of]

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2 Section 116(5) of the Act provided:

> Notwithstanding any other provision of chapter X, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances, and spare parts (as any of such are defined in the Civil Aeronautics Act of 1938, as now in effect or hereafter amended) leased, sub-leased, or conditionally sold to any air carrier which is operating pursuant to a certificate of convenience and necessity issued by the Civil Aeronautics Board and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of chapter X if the terms of such lease or conditional sale so provide.

Pub. L. No. 85-295, 71 Stat. 617, *reprinted in* 1957 U.S. Code Cong. & Admin. News 681.

rolling-stock equipment leased or conditionally sold to the debtor . . . ." *See* Act of August 27, 1935, pub. L. No. 74-381, ch. 774, 49 Stat. 922. That provision had been enacted "[i]n view of the necessity of readily financing purchases of new equipment at a time when the development of the transportation art is providing new forms of equipment . . . ." H.R. Rep. No. 1283, 74th Cong., 1st Sess. 4 (1935).

By its terms, § 116(5) gave protection to any party with title to leased equipment, and did not distinguish between lessors of equipment new to the airline and other lessors. Although the legislative history of that statute shows a Congressional concern with the need of airlines to "replace obsolete equipment with modern aircraft," the House Report reflects Congressional awareness that a major impediment to this goal was the inability of airlines to attract necessary capital. *See* H.R. Rep. No. 944, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926. The then-proposed amendment to the Act would "result in an increased availability of capital at a lower interest rate than would be demanded under present conditions." *Id.* Therefore, although Congress may have had the ultimate end in 1957 of encouraging airlines to acquire new equipment, one means to that end incorporated in the statute was to increase the availability and decrease the cost to an airline of capital. Thus, the encouragement of new equipment acquisition can in no way be considered directly contrary to the broad language which Congress chose to use. *See also In re Airlift Intern, Inc.*, 761 F.2d 1503, 1507 (11th Cir. 1985) (the purpose of § 116(5) was "to enhance the borrowing ability of airlines"); 5 *Collier On Bankruptcy*, ¶ 1110.01, at 1110-3 (L. King 15th ed. 1990) (the predecessor provisions of § 1110 "were designed to afford equipment financers greater certainty than existed under the other provisions of the Bankruptcy Act concerning such financers").

When the current Bankruptcy Code was adopted in 1978, the category of protected creditors was expanded to include secured parties with a "purchase-money equipment security interest." To the extent the legislative history of § 1110 discusses prior law, it shows that Congress continued to be con-

cerned with the need to encourage low cost financing of the airline industry. There is no clearly expressed intention for the new statute to restrict the types of lessors seemingly protected by the broad references in prior law to "any owner" or "any other lessor." In the House Report accompanying § 1110, Congress noted that the protection in the Bankruptcy Act had been "added as a means of encouraging new financing" in the airline industry. H.R. Rep. 595, 95th Cong., 1st Sess. 240, *reprinted in* 1978 U.S.Code Cong. & Ad. News 6199. The House Report further noted that "[w]hether or not there was an initial need for these provisions, their existence has become largely addicting to the financing industry, and now the industry claims it would simply cease financing of the relevant equipment if the protections were removed." *Id.*

Later on, discussing intended "changes" from the provisions of the prior Bankruptcy Act, the House Report first noted an intent "to preserve the limitations on the right of the financer contained in current law." *Id.* at 240. The Report then stated that in the new Bankruptcy Code, the list of protected transactions would be expanded to include "equipment security interests," with the limitation that "[t]he term includes only security interests that were granted to finance the acquisition of the covered equipment," while "[a] general mortgage is excluded." *Id.* Elsewhere, the report stated that "this section, to a large degree, preserves the protection given lessors" under prior law. *Id.* at 405.

The House Report explained the law's expansion to include certain secured lenders, and stated that the Bankruptcy Act had applied only to leases and conditional sales under the theory that in those transactions title to equipment remained with the "financer" and did not pass to the airline. *Id.* However, noting the changes in financing practices brought about by the adoption of Article 9 of the Uniform Commercial Code, in which a seller receiving a security interest did not retain title, the House Report then stated that "protection of security interests was added to make financing forms more flexible and more consonant with modern law." *Id.*

Pan Am cites these passages to argue that Congress intended the acquisition of newly acquired equipment to be a

necessary element for *all* § 1110 transactions, including leases. However, that history demonstrates with precision only that Congress refused to include Article 9 transactions within § 1110 unless they included an acquisition element; it fails to show with any clarity that Congress also intended to add an acquisition element to lease transactions. Of course, with respect to Article 9 transactions, Congress also demonstrated its intention in the clearest way it could, through the words it used, by limiting the statutory protection to a "secured party with a *purchase-money* equipment security interest." 11 U.S.C. § 1110(a) (emphasis added). There is no such statutory restriction on lease transactions within § 1110.

Pan Am also cites the following passage from the Congressional record: "This section protects a limited class of financers of aircraft and vessels and is intended to be narrowly construed to prevent secured parties or lessors from gaining the protection of the section unless the interest of such lessor or secured party is explicitly enumerated therein." 124 Cong. Rec. S17,419 (daily ed. Oct. 6, 1978). That statement does not prove Pan Am's case because "the interest of such lessor . . . [as] explicitly enumerated" in the statute is simply that of a "lessor" of qualified equipment to a qualified carrier. Moreover, the value of statements in the Congressional Record as barometers of legislative intent is minimal at best. *Begier v. I.R.S.*, 110 S.Ct. 2258, 2268 (1990) ("Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record") (Scalia, J., concurring).

If anything, the legislative history of § 1110 suggests that the Congressional omission of an acquisition element in lease transactions under § 1110 was intentional. In particular, the House Report noted that the protection provided by § 1110 to lessors of aircraft equipment was similar to the protection provided to other types of lessors elsewhere in the Code, except that with respect to § 1110, debtors were forced to make a decision on whether to assume or reject a lease within 60 days. H.R. Rep. 595, 95th Cong., 1st Sess. 240. Section 365 is the general Code provision defining a debtor's rights and obligations with respect to unexpired leases. Unlike § 1110, § 365(d)(2) generally allows a debtor to assume or

reject an unexpired lease of residential real property or of personal property "at any time before confirmation of a plan" unless a court orders otherwise, while § 365(b)(1) gives a debtor who chooses to assume an unexpired lease the option of either curing past defaults or "provid[ing] adequate assurance" of prompt cure. Significantly, § 365, like § 1110, also makes no distinction between leases of newly acquired equipment and leases that are part of a sale-leaseback transaction. Moreover, the text of § 365 demonstrates that when Congress wrote the Code, including § 1110, it knew how to distinguish among categories of lessors when it so desired. *See, e.g.*, § 365(h) (consequences to lessee of rejection by trustee of "an unexpired *lease of real property* of the debtor under which the debtor is the lessor") (emphasis added). Of course, § 1110 also distinguishes different types of lessors: it protects only lessors that lease qualified equipment to qualified airlines. However, Congress did not include the additional requirement that the qualified equipment be new to the qualified airline.

Pan Am argues also that because § 1110 *explicitly* limits protected security interests to those arising from acquisitions, it also *implicitly* limits leases in the same way. Yet by its terms, the statute protects "[t]he right of a secured party with a purchase-money equipment security interest in, *or* of a lessor *or* conditional vendor of, . . . [qualified aircraft equipment]." 11 U.S.C. § 1110(a) (emphasis added). Pan-Am's argument here contradicts both logic and rules of statutory construction. Congress placed explicit limitations on one group, by defining a protected secured party as "a secured party with a purchase money equipment security interest," without similarly limiting another in the same statute: a "lessor" is not limited to a lessor of newly acquired equipment. That difference suggests the logical conclusion that Congress actually did *not* intend so to restrict the class of protected lessors. Although acquisition inheres in the conduct of the third group of protected parties, "conditional vendor[s]," because

of the very nature of conditional sale transactions,[3] there is no such inherent acquisition element with respect to "lessor[s]." Leases arising out of sale-leaseback transactions are analyzed the same as ordinary leases. *See Frank Lyon* v. *United States*, 435 U.S. 561, 581 (1978) (lessor in sale-leaseback entitled to depreciation deductions). Finally, when Congress separates words or phrases in a statute with the conjunction "or," the Supreme Court has directed courts to give each term its "ordinary, separate meaning." *Garcia* v. *United States*, 469 U.S. 70, 73-75 (1984). Thus, the acquisition element explicitly imposed on secured parties, and the acquisition element inherent in the status of conditional vendors, implies no such acquisition element with respect to lessors—a separate class of parties protected by the statute.

The distinction Pan Am would draw, based on legislative history, between sale-leasebacks and conventional leases would generate numerous additional issues that could not be resolved by that legislative history. In the future, there would likely be litigation on whether the words Pan Am hopes to read into the statute through references to selected legislative history limit the protection of § 1110 to lessors of brand new equipment, lessors of equipment new to the debtor airline, lessors of equipment new to the debtor airline and also new to any predecessor of the debtor airline, *see Braniff*, 110 B.R. at 985, or some other category.[4] In addition, it would be unclear whether the statute applies to lease renewals if the equipment was new to the airline at the beginning of the ini-

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3 *See* Gerstell & Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, Am. Bankr. L.J. 1, 24-25 (1987) (noting that at the time of the enactment of § 1110's predecessors, "there already was a well developed body of law limiting the conditional sales priority to true purchase-money financing").

4 *See* Goldman, Album & Ward, *Repossessing the Spirit of St. Louis: Expanding the Protection of Sections 1110 and 1168 of the Bankruptcy Code*, 41 Bus. Law. 29, 53-54 (1985) (suggesting that post-acquisition sale-leaseback transactions generally should not qualify for § 1110 protection, but that the section should apply if the aircraft was owned by the airline only during the 90-day period in which the tax laws permit a lessee to transfer the benefits of an investment tax credit).

tial lease term.[5] As mentioned, Pan-Am concedes for purposes of this motion that § 1110 applies to leases of used equipment so long as that equipment is new to the airline. Yet this concession itself does not seem to arise from anything in the legislative history. In fact, although the issue was not treated by the Second Circuit, it appears that the transaction analyzed by the Court in *Air Vermont*, and found to be within the scope of § 1110, involved a used aircraft. *Air Vermont*, 761 F.2d at 130 (conditional sale contract dated April 27, 1982 for 1977 Piper Navajo aircraft). However, if, for example, an airline desires to continue operating Boeing 727's while awaiting delivery of new replacement aircraft that comply with new noise regulations, *see* The Airport Noise and Capacity Act of 1990, Pub. L. No. 101-508, §§ 9301-09 (Nov. 5, 1990) (requiring Secretary of Transportation to implement new regulations "including the phaseout and non addition of Stage 2 aircraft"), and would like to finance the newer aircraft in part through a sale-leaseback of the older planes, there is no principled distinction between a lease that involves the used aircraft previously owned by the airline, and a transaction in which the airline simply adds the step of trading its planes for identical used equipment, or similar used equipment such as DC-9's, controlled by an airline broker or owned by another airline interested in doing the same type of transaction. In cases such as this where the legislative history appears to reflect many seemingly different but consistent goals, courts should be reluctant to rewrite the words of a statute unless the plain meaning of those words leads to a result clearly contrary to Congress' expressed intention. Otherwise, the benefit sought to be achieved by a statute like § 1110—the prospect of a quick and predictable remedy that encourages potential financers to be forthcoming—will be lost in a miasma of potential litigation. Here, the best rule of law may be a rule of thumb, with protection for all transac-

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5 *See* Giddens & Schick, *Section 1110 of the Bankruptcy Code: Time for Refueling?*, Am. Bankr. L.J. 109, 123, 128 n. 56 (1990) (suggesting that "if lease renewals are contemplated at the commencement of a lease of equipment that the airline did not previously possess, then the renewals should be afforded the protection of § 1110").

tions that meet the statutory requirements Congress itself imposed. "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.).

Including all lessors within the scope of § 1110 would certainly not create an absurd or even unreasonable result. In fact, it is directly consistent with Congress' stated policy of increasing capital availability at the lowest possible cost. *See Seidle* v. *GATX Leasing Corp.*, 778 F.2d 659, 663 (11th Cir. 1985) ("Congress intended that section 1110 encourage *new financing* of . . . airplanes.") (emphasis added). That stated legislative purpose is consistent with Congress' ultimate goal of fleet modernization. *See In re Air Vermont*, 761 F.2d at 132 ("Congress did intend to extend extraordinary protection *to financiers of aircraft* in order to encourage investment in new equipment for air carriers.") (emphasis added). Although a "lessor" that leased new equipment to an airline in reliance on the statute would directly further Congress' goal, a lessor who purchased and then leased an airline's existing equipment also would further that goal, albeit indirectly, by freeing up the equity in the airline's primary existing asset, its equipment fleet. A sale-leaseback benefits the lessor by allowing it to take advantage of tax deductions that may be unavailable to the airline. The lessor also can anticipate some future return from the aircraft's residual value after expiration of the lease. *See generally* Kruft, *Leveraged Aircraft Leases: The Lender's Perspective*, 44 Bus. Law. 737, 738 (1989). Because of these benefits, a lessor in a sale-leaseback transaction is often an airline's cheapest source of low cost financing for fleet modernization. Moreover, besides using what is likely to be an airline's least expensive source of capital—its own—a sale-leaseback enables the airline to retain use of existing equipment and therefore continue operations during the time lag between order and delivery of new equipment.

Sale-leaseback transactions of the type and complexity in which Pan Am engaged may not have been directly contemplated at the time of the statute's enactment, nor explicitly

mentioned in the legislative history,[6] and may or may not have been a relatively innovative technique in 1957 and 1977, when the statutes were enacted. *Contrast In re PCH Assocs*, 804 F.2d 193, 200 (2d Cir. 1986) (describing sale-leasebacks as a " 'relatively modern, and clever, structure of financing.' ") (citation omitted) *with Sun Oil Co.* v. *C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977) ("we recognize that sale-leaseback arrangements play a useful and accepted role in our economy"); *see also Yorkshire Ry. Wagon Co.* v. *Maclure*, 21 Ch.D. 309, 319 (1882) (treating sale-leaseback of "locomotives and wagons" as bona-fide transaction). However, because Congress's broad purpose in enacting both § 157(6) of the Act and § 1110 of the Code was to increase the availability of low cost capital in order to facilitate fleet modernization, there is no clear evidence that Congress intended to limit the benefits of that section to lessors of newly acquired equipment. Congress could have accomplished its goals in many ways, for example by providing protection to any creditor of an airline, or by limiting the protection to lessors of newly acquired equipment; it could also have helped the aircraft manufacturing industry by providing protection only to lessors of new equipment manufactured in the United States. For reasons it deemed sufficient, Congress chose simply to provide protection to a "lessor" without restriction and "whether as trustee or otherwise," so long as the lease involved "aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 101 of the Federal Aviation Act of 1958," and so long as the equipment was leased to an "air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board." 11 U.S.C. § 1110(a).

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6 Congress was certainly familiar with sophisticated leveraged lease transactions. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 405, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6361 (stating that § 1110 applies with equal force whether "the debtor has granted the security interest to the financer or if the debtor is leasing equipment from a financer that has leveraged the lease and leased the equipment subject to a security interest of a third party").

Pan Am argues that this interpretation of § 1110 would allow parties that are in substance non-purchase money secured lenders to receive the protection of § 1110 by doing little more than using the word "lease" in their transactional documents. Yet a court that applies the provisions of the Code to a set of facts must always looks beyond the form of a transaction to its substance, *Pepper* v. *Litton*, 308 U.S. 295, 305 (1939), a feat that can be accomplished with minimum time and effort here. As one pair of commentators have noted:

> "The factor of economic ownership reveals the superficiality of any resemblance between the sale-leaseback transaction and a secured loan. Where the resulting lease is a true lease, a genuine change in ownership, evidenced by a transfer of residual risk, has taken place."

Gerstell & Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, Am. Bankr. L.J. 1, 25 (1987). In drafting § 1110, Congress was keenly aware of the Uniform Commercial Code's distinction, *see* § 1-201(37) (McKinney's 1991), between true leases and "leases that are merely disguised security agreements," H.R. Rep. 595, 95th Cong., 1st Sess. at 240, and a court can certainly conduct such an analysis in any proceeding to determine whether a "lease" claiming § 1110 protection is in fact a loan. *See In re PCH Associates*, 804 F.2d at 199-200 (ground lease with initial term of 33 years, renewable for an additional 165 years, was in substance a loan transaction rather than bona fide lease within the meaning of § 365); *In re Chateaugay Corp.*, 102 B.R. 335, 343 (Bankr. S.D.N.Y. 1989) (status of sale-leaseback under Code depends on "whether the leaseback actually transfers the normal risks and responsibilities of lessor status"). Because Judge Blackshear reserved decision on whether certain leases between Pan Am and others were in fact true leases, *see* Order ¶ 10, that issue is not presented here.

Neither the words and structure of the statute, nor the legislative history of either § 1110 or that section's Bankruptcy Act predecessor, indicate that including all lessors within the

protection of § 1110 would produce a result "demonstrably at odds with the intention of its drafters." *Ron Pair Enterprises*, 109 S.Ct. at 1031. If the lease is a true lease, rather than a disguised loan, and meets all other elements of the statute—*e.g.* qualified equipment, qualified air carrier, repossession clause in lease—the lessor is protected by § 1110. To the extent this decision conflicts with the recent bench decision of Judge Balick of the Bankruptcy Court for the District of Delaware, I respectfully disagree with the analysis and application of the legislative history in that case. *See* Transcript, *In re Continental Airlines, Inc.*, Nos. 90-932 through 90-980 (Bankr. D. Del. January 30, 1991), *appeal pending, In re Continental Airlines, Inc.*, No. 91-58 (RSG) (D. Del.).

Paragraph 5 of the Bankruptcy Court's order is affirmed.

SO ORDERED:

/s/ MICHAEL B. MUKASEY
Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
March 18, 1991

## APPENDIX C

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 91 B 10080
through 91 B 10087 (CB)

Docketed March 15, 1991

In re

PAN AM CORPORATION, *et al.*,

*Debtors.*

DECISION ON DEBTORS' MOTION PERTAINING TO SECTION 1110 OF THE BANKRUPTCY CODE

Before:

HON. CORNELIUS BLACKSHEAR,
*Bankruptcy Judge.*

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## THE MOTION

Pan Am Corporation *et al.* (the "Debtors") have filed a motion seeking a determination as to the reach of section 1110 of the Bankruptcy Code (the "Code"). Specifically, they seek a Court Order:

(a) declaring that the Debtors' non-acquisition sale lease-back transactions (the "Sale-Leasebacks") are not covered by Section 1110;

(b) declaring that certain of the Debtors' leases are not covered by section 1110 because they did not enable the Debtors to newly-acquire aircraft but rather were subsequently negotiated renewals or extensions of existing leases;

(c) declaring that certain aircraft are not covered by section 1110 because they were not acquired by an air-carrier that had the necessary certificate of convenience and necessity required for coverage under section 1110;

(d) declaring that section 1110 does not apply to certain transactions with General Electric Capital Corporation ("GECC") in which GECC does not have a purchase money equipment security interest ("PMESI") in certain aircraft and equipment owned by the Debtors;

(e) declaring that certain loan transactions with United Technologies Corporation and UT Finance Corporation (collectively, "UT") are not covered by section 1110 because UT does not have a PMESI in the engines serving as collateral for these loans;

(f) authorizing the Debtors to cure defaults relating to those transaction that the Debtors have preliminary determined are covered by section 1110 (the "Section 1110 Transactions"), subject to the Debtors' express reservation of its rights;

(g) declaring that cure payments by section 1110 do not include penalties, default interest, attorneys' fees and other payments owed by Debtors according to the terms of the relevant agreements as a result of Debtors' default under those agreements and declaring that Debtors are entitled to a credit for any cash deposit;

(h) declaring that all transactions concerning the use and/or possession of aircraft and related equipment to which any Debtor is a party, other than those transactions to which the Debtors concede are 1110 transactions, and precluding any party that fails to file a timely objection to this motion from claiming that section 1110 applies to any transaction; and

(i) such other relief as the Debtors may seek by proposed order from this Court as warranted by the Debtors' financial condition at the end of the 60-day period provided in section 1110.

At a hearing, held on March 7, 1991, this Court heard oral argument from the Debtors in support of their motion, from those parties in support of the Debtors' motion and from those parties opposing the Debtors' motion. This Court issued an oral ruling as to part of the Debtors' motion and reserved the right to issue a written decision. The portion of the Debtors' motion which questioned what "cure" under section 1110 entails was left for another day. In the interim, the Debtors were directed to make timely cure payments consisting of those amounts not in dispute.[1] This Court's oral ruling addressed the applicability of section 1110 to:

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1 The issues in dispute, including the attorneys' fees, penalty default interest rate, debtor-in-possession junior liens, and reservation of rights, will be addressed in the future at which point this Court will have an opportunity to fully review the relevant evidence.

(a) sale-leaseback transactions;

(b) lease extensions and renewals;

(c) leases with non-certified Debtors;

(d) the PMESI transaction entered into with GECC;

(e) the equipment switching/pooling arrangements.

In addition this Court also discussed what is referred to as the "True Lease" issue. This decision memorializes the aforementioned oral ruling rendered on March 7, 1991.

## BACKGROUND

On January 8, 1991 (the "Petition Date") the Debtors filed their respective petitions for reorganization under Chapter 11 of the Code. By an order dated January 8, 1991, this Court approved the joint administration of the Debtors chapter 11 cases for procedural purposes. The Debtors continue to manage and operate their businesses and properties pursuant to sections 1107 and 1108 of the Code.

The Debtors are part of a multinational organization that provides air transportation and transportation-related services in the United States and throughout the world. Pan Am Corporation is a holding company that directly or indirectly owns all of the issued and outstanding stock of the other Debtors, including Pan American World Airways, Inc. ("Pan Am") and Pan Am Express ("Express"). Pan Am Shuttle, Inc. ("Shuttle"), another subsidiary of Pan Am Corporation, provides hourly shuttle service between New York City and both Boston and Washington D.C..

Pan Am currently operates a fleet of 154 jet powered aircraft. Express, which serves as a feeder-carrier for the Debtors' international routes and provides service in the United States and Europe, operates 32 commuter aircraft (collectively with the Pan Am aircraft described above, the "Aircraft"). The Debtors also own or "lease" various spare engines and spare parts (together with the Aircraft, the "Aircraft and Equipment"). The Aircraft and Equipment are the

subject of leases, subleases, conditional sales agreements and security agreements (collectively the "Agreements").

Each of the Debtors presently holds one or more certificates of convenience and necessity within the meaning of section 1110 (the "Certificate"). Express did not acquire its Certificate until December 31, 1987.

## I. THE SALE-LEASEBACKS

Section 1110 of the Bankruptcy Code provides as follows:

> (a) The right of a secured party with a purchase-money equipment security interest, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301), or vessels of the United States, as defined in subsection B(4) of the Ship Mortgage Act, 1920 (46 U.S.C. 911(4)), that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board, or a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, as the case may be, to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—
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> > (1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and

(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

(A) that occurred before such date is cured before the expiration of such 60-day period; and

(B) that occurs after such date is cured before the later of—

(i) 30 days after the date of such default; and

(ii) the expiration of such 60-day period.

(b) The Trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.

Section 1110 relieves certain persons from the restrictions of the automatic stay and, subject to the terms of their individual agreements with the debtor, permits them to repossess aircraft and other equipment, unless the debtor to those agreements cures pre-petition defaults relating to those agreements within sixty (60) days of filing for bankruptcy. The debtor must cure post-petition defaults within the later of thirty (30) days of default or sixty (60) days from the petition date.

The substantive relief provided for in section 1110 is not a new concept in bankruptcy law. Indeed, section 1110 can be traced back to section 77j of the Bankruptcy Act which provided that an owner of conditionally sold or leased rolling stock could repossess the equipment from a railroad despite the commencement of a railroad reorganization case, which normally would stay such a repossession action.[2] In 1957,

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2 Section 77j provided in part:

The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any such

Congress enacted section 116(5), the predecessor statute to section 1110, extending the protection of section 77j to persons who lease to or conditionally sell to a debtor who is an air carrier.[3] In enacting section 1110, Congress adopted the provisions of section 116(5) and further extended its protection to PMESIs.

Section 1110 stands in stark contrast to sections 362, the automatic stay provision, and 365, the assumption or rejection of executory contracts or leases provision, of the Code. Congress obviously saw a need for this type of special legislation in order to protect certain persons who deal with air carriers. In this bankruptcy case, the Debtors seek a determination that section 1110 was extended to give this special status to only those who provide financing for the new acquisition of specified equipment. Specifically, the Debtors are of the view that the Sale-Leasebacks are not protected by section 1110.

This motion is made on the heels of the decision in the Continental Airlines, Inc. chapter 11 case wherein the bankruptcy judge squarely held that sale-leaseback transactions not involving the acquisition of new equipment did not fall within either the letter or spirit of section 1110. *In re Continental Airlines, Inc.*, Nos. 90-932 through 90-980 (Bankr.

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owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

41 U.S. Statutes at Large, 74th Cong., 1st Sess. § 77j at 922 (1935).

3 Section 116(5) provided:

Notwithstanding any other provisions of chapter X, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances, and spare parts (as any of such are defined in the Civil Aeronautics Act of 1938, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any air carrier which is operating pursuant to a certificate of convenience and necessity issued by the Civil Aeronautics Board, and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of Chapter X if the terms of such lease or conditional sale so provide.

D.Del. Jan. 30, 1991). Not surprisingly, this motion has garnered a host of opposition from lessors of aircraft, air-carrier equipment and other Airlines.[4]

As of the Petition Date, the Airlines were parties to numerous Sale-Leasebacks in which the Debtors "sold" Aircraft and Equipment which had been part of their fleet for many years to financiers, who then leased that same Aircraft and Equipment back to the Debtors. The Debtors did not acquire any new Aircraft and Equipment as a result of these transactions.

In asserting their claim, the Debtors posit that section 1110 is not clear on its face and mandates a review of legislative history, which the Debtors claim unequivocally demonstrates that Congress intended for this section to apply only to transactions involving a debtor's new acquisition of equipment.

As Justice Frankfurter wrote some 44 years ago, statutory construction begins with the reading of the actual words of the statute under scrutiny. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 535 (1947). Under well established canons of statutory construction, when a statute is clear on its face, it should be enforced in accordance with its terms. *United States v. Hopkins*, 853 F.2d 118, 119 (2d Cir. 1988); *United States v. Payden*, 759 F.2d 202, 204 (2d Cir. 1985). Courts are reluctant to sway from the clear and unambiguous provisions of a statute. The function of the courts is to interpret and enforce the law, not create it. When a court refuses to follow the clear and unambiguous terms of a statute and instead chooses to impose its own views and modifications, it is in effect legislating.

Section 1110 clearly and unambiguously applies to "a lessor of . . . aircraft." 11 U.S.C. § 1110(a). A lessor may, unless the airline cures all defaults and performs all obligations under Section 1110, "take possession of such equipment in compliance with the provisions of a . . . lease . . . ." *Id.* The terms "lease" and "lessor" are not modified or limited by the statutory language. The Debtors perceive an ambiguity

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4 American West Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc. and USAir, Inc., all represented by Lord Day & Lord, Barrett Smith, filed an amicus brief in opposition to the Debtors' motion.

in section 1110 insofar as it seems to provide for equal treatment of leases, PMESIs and conditional sales agreements. Lease transactions are entered into for a myriad of reasons; whereas for PMESIs and conditional sales the purpose is generally the same. Specifically, PMESIs and conditional sales are created for the very purpose of financing the acquisition of equipment, in this case airline equipment. On the other hand, lease transactions, which include sale-leaseback transactions, are not always a tool for financing the new acquisition of equipment. Rather, a sale-leaseback, where the air carrier sells to the lessor an aircraft that has been part of the air carrier's fleet for a substantial period of time, is a creative means of infusing working capital into the air carrier's business. Therefore, to some, there seems to exist an inconsistency in the statute since it extends equal protection to transactions which, at first blush, do not serve the same purpose. It is possible that Congress intended to extend section 1110's coverage to only those agreements relating to the new acquisition of equipment by an air carrier. But Congress did not so qualify the statute. A plain and literal reading of the statute calls for a nonrestrictive reading of the words lease and lessor.

The Second Circuit adheres to the plain meaning doctrine of statutory construction. In *California Chieftain v. Air Vermont, Inc. (In re Air Vermont, Inc.)*, 761 F.2d 130 (2d Cir. 1985), when asked to interpret section 1110, the court stated that "the statute's literal meaning must be applied, and no condition of recording may be superimposed on the requirements explicitly specified in order for § 1110 to apply." *Id.* at 134; *see also*, *First Nat'l Bank v. Shugrue (In re Ionosphere Clubs, Inc.)*, No. 90 Civ. 4323, slip. op. at 2 (S.D.N.Y. Jan. 17, 1991). In a more recent decision, *Maritime Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183 (2d Cir. 1990), the Second Circuit applied a literal interpretation of section 362(h) of the Code and refused to include corporations as parties with standing to request sanctions under section 362(h) of the Code since that section only refers to "individuals" as the parties who had standing to request sanctions. A plain read-

ing of section 1110 would dictate the terms lease and lessor be given its ordinary meaning and not be qualified in any fashion.

Courts must strive to listen to what Congress says, but, as Justice Frankfurter observed, sometimes "Congress cannot be heard clearly because its speech is muffled." Frankfurter, *supra* at 536. However, review of the legislative history of section 1110 does not give this Court reason to change its decision. The legislative history seems to suggest that section 1110 was intended to protect transactions involving the financing of new acquisitions of aircraft by a debtor. Congress refers to "financiers" and "equipment financing" throughout the House Report. However, as the court in *Braniff Inc. v. Toren* (*In re Braniff, Inc.*), 110 B.R. 980, 983 (Bankr. M.D. Fla. 1990) stated, Congress probably made such constant reference to the financing of equipment because it was discussing the modification of section 1110's predecessor, section 116(5) of the Bankruptcy Act, to include PMESIs which, by their very nature relate to the new acquisition of equipment. This change from the Bankruptcy Act was Congress's reaction to "changes in financing practices and in the bankruptcy laws . . . ." H.R. Rep. No. 595, 95th Cong., 1st Sess. 240 (1977), *reprinted in*, 1978 U.S. Code Cong. & Admin. News 6200. Therefore, section 1110's legislative history does not indicate that Congress intended to limit its application to acquisition type of transactions.

Congress, however, realized that this extension of coverage was limited and did not apply to interests that amount to nothing more than a secured interest in an aircraft or other equipment. The congressional record states that "[t]he term [equipment security interests] includes only security interests that were granted to finance the acquisition of the covered equipment. A general mortgage is excluded." *Id.*

The legislative history of section 1110 should not be read in a vacuum since it is the successor to section 116(5) of the Bankruptcy Act, which expressly provided protection to lessors of aircraft and other equipment to air carriers. The possessor of the title of equipment is given much consideration in section 116(5). A look at the legislative history of section

116(5) teaches that Congress used the term lease freely without seeing a need to modify it. The professed purpose of section 116(5) was to "render immune from the provisions of chapter X of the Bankruptcy Act the *title* and right to repossession of such property." H.R. Rep. No. 944, 85th Cong., 1st Sess. (1957), *reprinted in*, 1957 U.S. Code Cong. & Admin. News 1926 (emphasis added). Again, this excerpt shows that what concerned Congress was the fact that the title in leased equipment did not lie with the debtor. Indeed, the legislative history of section 1110 also reveals Congress' concern over title. In explaining the reason for the exclusion of certain secured transactions from 1110 protection, Congress stated that "[t]he theory behind the present limitation is that under leases and conditional sales, *title* of the property does not pass to the debtor, but remains in the financier. Thus, it is appropriate to exclude what is not property of the estate from the automatic stay in a reorganization case." H.R. Rep. No. 595, 95th Cong., 1st Sess., *supra*, at 240 (emphasis added).

Additionally, the legislative history of section 116(5) of the Act explains that the reason for its enactment was to increase availability of capital to air carriers at a lower interest rate. Congress observed that:

> Testimony before the Bankruptcy Subcommittee of this committee indicated that the smaller lines are presently unable to attract the capital necessary for their current re-equipment requirements. Testimony also indicated that the enactment of this bill would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions.

H.R. Rep. No. 944 85th Cong., 1st Sess., *supra* at 1926.

The Debtors claim that the lessors involved in Sale-Leasebacks not resulting in the new acquisition of equipment are getting through the back door what they could not get through the front door. But, this is not the case. Congress spoke of the increased availability of capital at lower interest rates. The Sale-Leasebacks under attack here accomplish just that. Clearly, the Debtors were in need of increased working

capital. Had the Debtors sought a traditional secured loan, undeniably that creditor would not have enjoyed the benefits of section 1110 and therefore, most likely, would have requested a high interest rate in order to compensate for the risk it was assuming. In contrast, a person buying an aircraft from the Debtor and leasing it back would enjoy benefits of section 1110 and therefore the cost of obtaining this working capital would likely be less than if the Debtor had obtained a working capital loan using an aircraft as the collateral. The lessors were not the only ones gaining from the Sale-Leasebacks, the Debtors also benefited.

The Debtors repeat throughout their papers that a determination by this Court that these Sale-Leasebacks are section 1110 leases would cost the Debtors, approximately $33 million dollars in cure liability. The Debtors, because of their financial straights, may not be able to assume such an onerous cure liability. This troubles the Court, but the financial straights of the Debtor cannot in any way change and impact on this Court's legal analysis. Justice Cardozo once said: "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933). Neither the statute nor its legislative history gives this Court cause to steer away from the plain meaning of the words of section 1110. Accordingly, the terms "lease" and "lessors" will not be read narrowly, rather their common meaning will be applied.

This determination falls in line with the bankruptcy court's decision in *In re Braniff, Inc.*, and is in direct contradiction with the bankruptcy court's ruling in *Matter of Continental Airlines, Inc.* (hearing on January 30, 1991). In both of those cases, the courts were faced with the same issue this Court is faced with.[5] The fact that both courts, in turning to the legislative history, reached completely opposite results magnifies the dangers of reading a congressional record in order to

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5 The court in *Braniff* was faced with the far-reaching issue as to whether section 1110 was intended to apply to only aircraft and equipment that are newly acquired by an air carrier lessee.

"glean" the intentions of Congress.[6] The statute clearly and unambiguously refers to "lease" and "lessor" without modifying or restricting those words; that is how this Court shall read section 1110.

## II. Lease Extensions and Renewals

Essentially, the Debtors extend the argument asserted in the Sale-Leasebacks issue to whether section 1110 applies to lease extensions and renewals. In each of these transactions, the Debtors had previously entered into leases with respect to covered equipment. Subsequently, at the end of the original lease term, new leases were negotiated or the existing leases were extended. As articulated above, the application of section 1110 should not be restricted to leases which assist in the Debtor's new acquisition of equipment; section 1110 similarly applies to lease extensions and renewals.

## III. Leases with Debtors Not Operating Under a Certificate of Convenience and Necessity

Certain parties entered into transactions with Express, which at the time of the transaction was not operating under a Certificate but which subsequently, and prior to the bankruptcy filing, was certified. Other parties entered into transactions with Pan Am Corporation, a holding company that directly or indirectly owns all of the issued and outstanding stock of the other Debtors, which has never been certified. Pan Am Corporation in turn subleased the Aircraft and Equipment to one of its affiliated certified Debtors.

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6 Courts are not alone in their conflicting interpretations of section 1110, commentators also differ. *Compare*, Giddens and Schick, *Section 1110 of the Bankruptcy Code: Time for Refueling?*, 64 Am. Bankr. L.J. 109, 128 (1990) (wherein the commentators concluded that section 1110 applies to the financing of newly acquired equipment.); *with*, Gerstell and Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 25-6 (1987) (wherein the commentators concluded that section 1110 should apply to all leases across the board).

Section 1110 applies to transactions with an "air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board." 11 U.S.C. § 1110. While the statutory language does not clearly require that a debtor be certified at the time the transaction was entered into, to rule otherwise would lead to incongruous results. For example, if on the eve of filing for bankruptcy an air carrier became certified, such a reading would permit a creditor who had entered into a transaction with a non-certified air carrier several years prior to the bankruptcy to gain the benefits of section 1110. This would surely be an unexpected windfall to those persons who entered into transactions with air carriers that were not certified as of the completion of the transaction. Therefore, lessors who knowingly entered into lease agreements with Express, prior to its certification, assumed the risk of not enjoying section 1110 status. The status of these parties will not be elevated because of Express' subsequent certification.

Unfortunately, some creditors claim to have entered into transactions with Express with the understanding of future certification. While this Court is sympathetic to those creditors' plight, it was never clear that subsequent certification would provide them with the section 1110 status they now seek. They assumed a calculated risk and have lost.

Parties who entered into transactions with Pan Am Corporation find themselves in an even worse position. Pan Am Corporation is not even an air carrier, let alone one operating under a Certificate. Section 1110 speaks of a debtor that is a certified air carrier. Nothing in the section nor its legislative history makes reference to transactions with affiliated debtors that are not certified air carriers which in turn sublease to a debtor that is a certified air carrier. To extend protection to these transactions would violate the language of section 1110. Moreover, Pan Am Corporation is a corporate entity separate and apart from its affiliated Debtors. Had these lessors wanted and intended to fall within section 1110's net of protection, they should have negotiated directly with the certified debtor.

## IV. Purchase Money Equipment Security Interest Transactions

General Electric Capital Corporation ("GECC") and United Technologies ("UT") allegedly are holders of PMESIs in aircraft and/or equipment of Pan American World Airways, Inc. ("Pan Am"). Pan Am alleges that its transactions with GECC and UT did not create proper PMESIs, and therefore, GECC and UT are not entitled to the benefits of section 1110 of the Code. UT has not filed either an objection or response to the Debtors' motion to treat UT's interest as other than a PMESI (a non-PMESI), and therefore, UT will not be discussed.[7]

### A. Pertinent Facts

In 1985, GECC entered into a loan agreement with Pan Am which provided that Pan Am would apply the aggregate loan proceeds towards the purchase from GECC of 5 aircraft and 20 engines (the "Collateral"). The loan proceeds were also used for modification of the aircraft. The 1985 agreement was memorialized in a promissory note, security agreement and chattel mortgage. The instruments granted to GECC a security interest in the Collateral. However, the loan was not a "one-to-one" transaction; the loan was also secured by additional Aircraft and Equipment already owned by Pan Am. The additional Aircraft and Equipment were included allegedly to induce GECC to enter into the loan agreement. Further, there were certain antecedent non-purchase money obligations between Pan Am and GECC (and GECC's parent) from 1981 which were worked-into the 1985 transaction so that the 1985 Collateral would also act as security for the 1981 obligations.

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7 The Debtors and UT had apparently reached an agreement in principle. However, UT did file a response to the objection of the Creditors Committee to UT's § 1110 status. At the § 1110 hearing, this Court approved the agreement between the Debtors and UT over the objection of the Creditors Committee. *See* Transcript of March 7, 1991 Hearing at 44-55.

In 1987, GECC extended an additional loan to Pan Am. The 1987 loan agreement provided that the 1985 Collateral, in addition to other collateral, would act as security for the 1987 loan. The 1987 loan was a general purpose loan and was not designed to finance the acquisition of any aircraft or equipment. Neither the 1981 nor the 1987 loan is a PMESI, and GECC admits this. Thus, this Court must focus on the 1985 loan.

### B. Pan Am's Argument

Pan Am relies on the general rule of purchase money security interests which states: "if collateral secures debt other than its own price, it is *not* a PMSI." *In re Ionosphere Clubs, Inc.*, 112 B.R. 78, 83 (Bankr.S.D.N.Y. 1990) ("*In re Ionosphere Clubs*"). Thus, the traditional PMESI is *not* created if the lien secures pre-existing debt (like the 1981 loan), the loan was not advanced solely to acquire the collateral (the 1985 aircraft modifications), or additional pre-existing collateral is added to the transaction as additional security or inducement for the lender (the 1985 loan). *See e.g.*, *Roberts Furniture Co. v. Pierce (In re Manuel)*, 507 F.2d 990, 993 (5th Cir. 1975); *Southtrust Bank v. Borg-Warner Acceptance Corp.*, 760 F.2d 1240, 1243 (11th Cir. 1985); *Booker v. Commercial Credit Corp. (In re Booker)*, 9 B.R. 710, 711 (Bankr. M.D. Ga. 1981).

### C. GECC's Argument

GECC relies on a recent decision of the district court wherein Judge Sweet reversed the decision of the bankruptcy court in *In re Ionosphere Clubs*, which confronted a similar issue in the Eastern Airlines bankruptcy. *First Nat'l Bank v. Shugrue (In re Ionosphere Clubs Inc.)*, No. 90 Civ. 4323, slip op. (S.D.N.Y. Jan. 17, 1991) ("*Ionosphere*"). In *Ionosphere*, Judge Sweet explicitly held that where the proceeds of a loan are used to purchase aircraft and equipment, and the aircraft and equipment also secure other indebtedness, the lender has

a PMESI with respect to the identifiable amount of such loan. *Ionosphere*, slip op. at 10, 16.

## D. Discussion

Pan Am and GECC read *Ionosphere* differently. Since *Ionosphere* is a recent case from our district which appears to be on point, this Court will analyze and compare the district court's opinion in *Ionosphere* with the case at hand.[8]

In *Ionosphere*, several lenders (the "Airbus Lenders") made loans in 1978 and 1981 (the "Airbus Loans"), under an indenture established in 1963, to Eastern Airlines to finance the acquisition of certain aircraft (the "Aircraft"). When purchased, the Aircraft became part of a "floating collateral pool" which was established by the indenture and consisted of aircraft, engines and parts owned from time to time by Eastern. The actual property in the pool changed over time as old property was removed from the pool and new property was added. The indenture permitted future advances from lenders and had after-acquired property clauses. All of the loans subject to the indenture were equally and ratably secured by the collateral pool. Consequently, the Aircraft secured debt other than their purchase price, and the Airbus Loans were secured by collateral other than the Aircraft. Moreover, the Airbus Lenders did not have a specific lien on the Aircraft. Rather, under the terms of the indenture, the Airbus Lenders had at any given time an equal and ratable claim on the collateral pool as it existed at the time, and the actual lien on the collateral pool was held by the indenture trustee. If Eastern removed any aircraft from the collateral pool (by sale or otherwise), it was immediately required to prepay the outstanding amount of the note associated with that aircraft.

When Eastern filed for bankruptcy protection, the Airbus Lenders claimed to have the protection of section 1110 as holders of PMESIs in the Aircraft. The bankruptcy court

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8 The following discussion of facts is taken from pp. 3-6 of the *Ionosphere* slip opinion.

found that the security interest of the Airbus Lenders was not a PMESI because the Aircraft not only secured airbus loans, but also the antecedent debts owed to the other lenders with interest in the collateral pool. *In re Ionosphere Clubs*, 112 B.R. at 83-88. This determination was based on the general rule of PMESIs, i.e., if the collateral secures more than its own purchase debt it is not a PMSI. *Id.*

In reversing the bankruptcy court decision, Judge Sweet rejected the "transformation rule" and adopted the "dual status" rule. *Ionosphere*, slip op. at 11-16. The transformation rule examines whether a refinancing, in which purchase money debt is restructured or replaced with new debt, defeats PMSI status for the lien securing the refinancing debt. *In re Ionosphere Clubs*, 112 B.R at 78. The bankruptcy court determined that the Airbus Loans were not PMESIs based on the general PMSI rule, and although it discussed the transformation rule, the bankruptcy court felt it was not necessary to go that far. *Id.* at 84. Judge Sweet explained that the dual status rule is so-called "because it allows a security interest to have both the status of a PMSI to the extent that it is secured by collateral purchased with loan proceeds, and the status of a general security interest, to the extent that the collateral secures obligations unrelated to its purchase." *Ionosphere*, slip op. at 12.

The result of the application of the dual status rule to the Airbus loans was that so long as the creditor was able to determine the outstanding balance of any purchase money indebtedness, that portion would be protected under section 1110. Thus, Judge Sweet followed, and gave strength to, the modern trend which recognizes that only the security interest which secures the non-purchase price debt is not a PMSI, but the interest which secures the purchase price debt retains its PMSI character.[9]

Thus, upon repossession and sale of the collateral, proceeds may only be applied to satisfy the purchase price debt. Any surplus would be returned to the debtor, to be held for the benefit of all creditors who held non-purchase money

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9 The dual status theory is somewhat analogous to claim bifurcation under § 506 of the Code.

security interests in that collateral. When the PMSI exceeds the value of the collateral, the PMSI would cover the entire collateral. *Id.* at 16.

Judge Sweet discussed the problem of the allocation of a loan payment amount to PMSI and non-PMSI interests. *Id.* at 15. In *Ionosphere*, he found no problem of allocation because the differing obligations were owed to different creditors. *Id.* at 16. However, Judge Sweet also discussed the issue of when the debtor has taken multiple loans from a *single* creditor to finance multiple purchases, with each loan secured by security interests in *all* the purchased property (similar to the case, *sub judice*). *Id.* at 14. He concluded that although this situation could be complex, so long as the creditor had a method for determining how much of a PMSI exists in each of the purchased items, the creditor would retain its preferred standing in the collateral. *Id.*

This Court adopts the reasoning set forth by Judge Sweet and follows the *Ionosphere* decision. The lending arrangements relating to the 1985 loan between Pan Am and GECC present, possibly, an even more compelling set of facts for the application of the dual status rule as described in *Ionosphere*.

For example, here, there is no floating collateral pool with multiple lenders that have equal and ratable claims on the pool as a whole. GECC is a lienholder itself; there is no indenture trustee which is the lienholder, as in *Ionosphere*. The 1985 loan instruments do not include any provisions purporting to secure future advances or place liens on after-acquired property. The Court is cognizant that the 1985 loan involved cross-collateralization of pre-existing debt which might not have existed with the Airbus Loans in *Ionosphere*. However, there was pre-existing debt and pre-existing collateral within the *Ionosphere* collateral pool upon which each lender had an equal and ratable lien. Thus, *Ionosphere* is not as distinguishable as the Debtors would suggest.

*Ionosphere* requires that a creditor be able to determine the outstanding balance of purchase money indebtedness. Here, GECC can easily determine the amount of its PMESI by reference to the 1985 notes GECC is only looking to, and can

only, reclaim the PMESI amount from the 1985 loan, not on any of the cross-collateralization of the previous or subsequent loan transactions. To the extent that there has been payment on the 1985 PMESI notes, the amount of the PMESI is decreased.

Finally, Pan Am claims that the instant case differs from *Ionosphere* in that the Airbus Lenders' collateral consisted of cash collateral, rather than aircraft or equipment.[10] However, it is clear that Judge Sweet's decision did not hinge on this fact. Rather, it appears to be consistent with Judge Sweet's decision that so long as the creditor has a valid PMESI, and is entitled to priority under the Uniform Commercial Code and the Bankruptcy Code, it retains its preferred standing and is able to exercise whatever remedies are provided for in its agreement with the debtor. To the extent that the value of the collateral exceeds the amount of the valid PMESI, the creditor must return the surplus to the debtor. It is of no moment for a debtor to argue that the creditor should not be able to exercise its repossession remedies because the value of collateral far exceeds the amount of a PMESI; that is specifically what the parties bargained for when they entered the PMESI transaction.

In sum, the facts relating to the 1985 loan clearly fall within the realm of Judge Sweet's decision and this Court is persuaded to follow *Ionosphere* and apply the dual status theory. Consequently, *Ionosphere* establishes that GECC's lien on the 1985 aircraft and equipment is a PMESI to the extent that it secures the 1985 purchase money debt, and to that extent, it is protected under section 1110.

## V. Equipment Switching/Pooling Arrangements

The Creditors Committee argues that to the extent an alleged lease or PMESI agreement permits interchange or

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10 Eastern had sold the aircraft in dispute pursuant to orders which were without prejudice to the rights of the parties under § 1110 and that the proceeds would be held in escrow and would be deemed equivalent to the aircraft for the purposes of the § 1110 dispute. *Ionosphere*, slip op. at 6.

pooling of aircraft parts and equipment, which would allow for replacement of a lien onto different equipment than that originally provided by the creditor directly, or the equipment provided through the creditor's financing, the transaction falls outside the protection of section 1110. This is so because the claimant thereby releases its rights to the specific, identifiable property originally encumbered. The Committee asserts that the end result of this exercise is a sale.

To the extent that a pooling or interchange agreement relates to an alleged PMESI, this Court follows the decision of Judge Sweet in *Ionosphere*, which permitted such arrangements to retain their PMESI character under the "dual status" rule. The dual status rule applies so long as the PMESI amount and the property to which it relates are identifiable.

As for alleged lease transactions, if under the lease agreement the lessor is permitted to repossess aircraft or equipment, and under the interchange or pooling arrangement the collateral to be repossessed is identifiable and equivalent, despite the fact that it is not the same collateral originally loaned, the arrangement falls within the protection of section 1110.

This determination is necessary because the vast majority of lease transactions in the airline industry include provisions which permit an airline lessee to exchange airframes,[11] engines or other parts through pooling or interchange agreements and to replace equipment which becomes destroyed, worn out, lost or damaged beyond repair with a replacement engine or part of like quality or value. Affidavit of Nils Hallerstrom at ¶ 3; *see also* Memorandum of Creditors Committee at 11, n. 5. The fact that such exchange is permitted by the express terms and conditions of a lease does not transform the lease into something else. The equipment, or its equivalent, must be returned to the lessor at the end of the lease. Therefore, as a policy consideration, this Court is loathe to alter this uniform practice of aircraft leasing developed by those in the industry over many years and currently

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11 In the case of an airframe, title thereto always remains with the lessor, and at the termination of the lease, that particular airframe must be returned to the lessor.

implemented. Thus, provided that at the end of the lease the lessor will have title to, and be entitled to recover, specific, identifiable property, the lease will come within the protection afforded lessors under section 1110. This is so, despite the reality that equipment, engines or parts thereof may not be that which was originally leased. Indeed, in Uniform Commercial Code section 2A-103 a lease is defined as "a transfer of the right to possession and use of goods for a term in return for consideration." U.C.C. § 2A-103(j). There is no requirement that specific, identifiable property be redelivered.[12] The substitution provisions at issue here do nothing more than enable the Debtors to operate the aircraft in the normal course of its business, which unquestionably requires the frequent servicing, and thereby the frequent substitution, of various of each aircraft's parts, including its engines.

## VI. True Leases

The Debtors urge that many of the transactions are not leases, but are disguised non-purchase money security interests which are not protected by section 1110. The Debtors assert that the Court must hold an evidentiary hearing on each challenged lease to determine whether it is a true lease or merely a disguised security interest, before the Court can

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12 The Creditors Committee's citation to 5 King, *Collier on Bankruptcy* § 1110.01 at 1110-19 (15th ed. 1990), is misleading. Committee Memo. at 10. The Committee urges that the quote supports its view that interchange destroys the protection of § 1110. The citation in its entirety states:

> Section 1110 does not protect a secured party or lessor unless such secured party or lessor has the right to take possession of the equipment which it financed under the terms of the security agreement, lease or conditional sale contract between the financers and the debtor. *The right to take possession must be explicit in the agreement or contract.*

*Id.* (emphasis added to portion not included by Committee in their memorandum). There is no suggestion that a right under an agreement to return equivalent property in lieu of the original property will render § 1110 inapplicable. *Collier* merely seeks to emphasize the statutory requirement that the right to take possession must be explicit in the agreement or contract.

permit any repossession under section 1110. However, the Debtors do not specify which transactions are not true leases, but rather list in exhibit "E" those which are proper leases subject to section 1110.

The Debtors and various lease claimants have addressed the true lease issue. Collectively, they set forth the assorted tests for determining whether a transaction in substance is a lease or a security interest (for general loan or sale). For the most part, they rely on the same authorities.

This Court has reviewed the various tests and factors set forth in case law and elsewhere, and discerns that they are collectively similar, if not identical, to the factors set forth in the Uniform Commercial Code.[13] Section 1-201(37) sets forth the relevant inquiries.[14] It is clear to this Court that the mere

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13 Relevant authorities include *Nynex Bisc v. Beker Indus. Corp. (In re Beker Indus. Corp.)*, 69 B.R. 937, 939 (Bankr.S.D.N.Y. 1987); *In re The Answer—The Elegant Large Size Discounter, Inc.*, 115 B.R. 465, 469 (Bankr.S.D.N.Y. 1990); *In re Alpha Creamery Co.*, 4 U.C.C. Rep. Serv. 794, 797-98 (Bankr. W.D. Mich. 1967).

14 Section 1-201(37) states, in part:

> Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and
>
> (a) the original term of the lease is equal to or greater than the remaining economic life of the goods,
>
> (b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,
>
> (c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or
>
> (d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.
>
> A transaction does not create a security interest merely because it provides that
>
> (a) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

fact that a transaction is denominated as a lease is not dispositive of the issue. It is evident that a fact-intensive inquiry into each alleged lease is required for such a determination. However, this Court does not have the luxury to do so at this late time.

Our situation is unlike that faced by the court in *Liona Corp. v. PCH Assocs. (In re PCH Assocs.)*, 804 F.2d 193 (2d Cir. 1986), in which the Debtors place great reliance. In *Liona Corp.*, a lease subject to section 365(d) was in issue, and the court had the time to determine whether the transaction was a lease or a security interest, because the court under section 365 can unilaterally extend the time to assume or reject, and is not prohibited from exercising its equitable powers under section 105.

Here, this Court is explicitly prohibited from extending the 60 day period under section 1110 unless the interested parties so agree. The language of section 1110 plainly provides that a lessor's right to take possession remains unaffected "by section 362 or 363 of this title or by any power of the Court to enjoin such taking of possession." 11 U.S.C. § 1110(a). Section 1110 is one of the few provisions in the Code limiting the broad equitable power of this Court codified in section 105(a). Accordingly, if this Court, pursuant to the Debtors' request, engages in fact-intensive evidentiary hearings to determine whether certain leases are true leases before the lessors can exercise their rights under section 1110, the 60 day

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(b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(c) the lessee has an option to renew the lease or to become the owner of the goods,

(d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

period provided in the section will be emasculated. The Debtors could then retain possession of the aircraft and continue to use it well beyond the 60 day period while the lessors remain unpaid. However, the plain language of section 1110 precludes such a result.

In sum, this Court has no authority at this late date to prevent lessors with the right to repossess under their agreement from doing so pursuant to section 1110. However, such parties act at their peril if their alleged leases are not true leases. If a lessor so acts and it is subsequently determined that the transaction was other than a lease protected by section 1110, such party will be responsible for return of the collateral or proceeds, damages, costs etc.. In addition, there would be a violation of the automatic stay, and although sanctions may not be levied under section 362(h), such action would be a violation of this Court's order prohibiting such action against the property of the estate and would be subject to contempt sanctions.

This Court will not issue any "comfort order" to the alleged lessors. If they desire this Court's approval, they may commence an adversary proceeding and file a motion for declaratory judgment that § 1110 applies to their specific transactions with the Debtor, or take whatever steps they deem necessary.

## CONCLUSION

In conclusion, this Court holds that: (1) the Sale-Leasebacks are subject to section 1110; (2) lease extensions and renewals are similarly protected; (3) section 1110 only applies to transactions entered into with air carriers that were certified at the time of the transaction; (4) the PMESIs of GECC are protected by section 1110; (5) equipment switching and pooling arrangements in an agreement do not remove the transaction from the protection of section 1110; and, (6) this Court has no authority at this late date to prevent alleged lessors from acting pursuant to section 1110; however, those parties act at their own peril.



Dated: New York, New York
March 15, 1991

/s/ CORNELIUS BLACKSHEAR
Cornelius Blackshear
United States Bankruptcy Judge

MOTION FILED
APR 29 1991

No. 90-1530

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

PAN AM CORPORATION, et al.,
*Petitioners,*

v.

SECTION 1110 PARTIES, et al.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF EQUIPMENT LESSORS SUPPORTING RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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April 29, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF EQUIPMENT LESSORS SUPPORTING RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI**

The American Association of Equipment Lessors ("AAEL") hereby moves for leave to file the annexed Brief Amicus Curiae Of American Association Of Equipment Lessors Supporting Respondents In Opposition To Petition For Certiorari. AAEL's interest is set forth in the annexed Brief Amicus Curiae. Written consent has been obtained from the petitioners and is being lodged with the Clerk. Written consents have been obtained from counsel for a substantial number of the respondents and are being lodged with the Clerk. However, in view of the large number of respondents, consents have not been received on behalf of all of them (though none has been refused) as of the time this motion and annexed brief are being prepared for filing, and, hence, as a precaution, this motion is accompanying the brief.

Respectfully submitted,

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF EQUIPMENT LESSORS SUPPORTING RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF EQUIPMENT LESSORS SUPPORTING RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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The American Association of Equipment Lessors (AAEL), as amicus curiae, does not doubt that the question of law under Section 1110 of the Bankruptcy Code presented by the petition for certiorari is a question having importance. But in AAEL's view, it is not important that this question, which has been correctly disposed of by the three courts below, be given still further appellate review—at least in the absence of a conflict of Circuits, which has not occurred and

which there is no reason to think is likely to occur. Accordingly, AAEL strongly urges that Pan Am's petition for certiorari be denied.

## INTEREST OF AAEL

AAEL is the major national trade association in the multi-billion dollar equipment leasing industry, with about 900 member companies, located throughout the United States and in foreign countries, engaged in every aspect of leasing equipment to business, commercial, governmental and agricultural organizations.

According to the Department of Commerce, the volume of equipment leasing in this country, as measured by original cost of the equipment, was $132.0 billion in 1990, and is projected to be $143.7 billion in 1991.[1] AAEL estimates that AAEL's members account for over two-thirds of this volume.

Equipment leasing represents well over 30 percent of all capital investment in the United States each year. Second only to the commercial paper/bond market, leasing is the next largest source of investment capital for business, industry and agriculture in our economy. Equipment is also leased to federal, state and local governmental agencies for a variety of important public uses.[2]

---

[1] U.S. Department of Commerce, "1991 U.S. Industrial Outlook" (January 1991) at 51-1.

[2] Equipment leasing is utilized by, and helps to fuel the economic growth and productivity of, virtually every segment of our economy. The types of equipment leased for business purposes include agricultural; aircraft; automobiles; computers; construction; container and intermodal equipment; electrical power

AAEL estimates that approximately 130 of its members engage in the leasing of aircraft to certificated carriers and others. A very substantial portion of these leases are sale-leaseback arrangements which would be adversely affected in major ways if Pan Am's position were to prevail. This led AAEL to make submissions as amicus curiae in the courts below opposing Pan Am on the merits. It is AAEL's understanding that the sale-leaseback is the dominant form of aircraft leasing transaction employed in the United States airline industry—with respect to both newly-acquired aircraft and previously-acquired aircraft.

As the national trade association for equipment leasing companies, AAEL is vitally interested in matters which affect the industry. The applicability of Section 1110 of the Bankruptcy Code to sale-leaseback transactions—and particularly to "non-acquisition" sale-leaseback transactions—is an issue which has profound effects not only on AAEL's members but also on the ability of airlines to obtain needed aircraft and financing and hence, in a much larger sense, on the public interest. From its national perspective, AAEL is in a position to help the Court assess the strong reasons why further appellate review of this issue through a grant of certiorari is not called for.

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generation; furniture and fixtures; industrial; manufacturing; materials handling; medical; office machines; pollution control and environmental; railroad rolling stock; telecommunications; trucks and trailers; and vessels. Equipment leasing is one of the major methods by which American businesses acquire the capital equipment and financing needed to succeed in today's highly competitive domestic and international markets.

## REASONS FOR NOT GRANTING CERTIORARI

In summary form, in addition to the points being made by others, the points to which AAEL especially invites attention, in opposition to Pan Am's petition for certiorari, are these:

1. No conflict of decisions exists. This case has been decided unanimously against Pan Am by the Bankruptcy Judge, by the District Court, and by a unanimous Court of Appeals. Moreover, in the Continental Airlines bankruptcy originating in the District of Delaware, a contrary decision by a Bankruptcy Judge in the District of Delaware was promptly reversed by the District Court there in a well-reasoned opinion which fully accords with the decisions here. *In re Continental Airlines, Inc. et al., Debtors*, Cases Nos. 90-932 through 90-984, Civil Action No. 91-58, decided March 26, 1991. Continental has taken the decision on appeal to the Third Circuit (No. 91-3204). The appeal is scheduled to be argued in the Third Circuit on May 1, 1991, but there is no reason to suppose the District Court will be reversed. The only other decision directly in point, by the Bankruptcy Court in the Middle District of Florida, is likewise in accord. *In re Braniff, Inc.*, 110 B.R. 980 (Bankr. M.D.Fla. 1990). Thus, the law has been firming up on a uniform basis and can be expected to become correctly settled without any need—or indeed any occasion—for intervention by this Court. In this connection, it should be noted that Pan Am's petition for certiorari (p. 12) acknowledges that:

> "The Court is unlikely to benefit from further review of this issue by the lower courts. A consensus has clearly developed contrary

> to the position we advocate on this appeal, including comprehensive opinions by district courts acting as appellate courts in the Second and Third Circuits. The Court of Appeals below obviously thought the issue was sufficiently settled that it did not even choose to write an opinion."

2. The opinions which have been rendered are careful and convincing as well as correct. Not only are the opinions "comprehensive" as Pan Am has acknowledged; they also deal with the issues meticulously and definitively. Every argument by which Pan Am has made a futile effort to distill something out of the legislative history and the structure of the statute has been presented by Pan Am below and has been found, with total justification, to be without legal merit. Further appellate review is not called for.

3. The granting of certiorari would deprive the lessors, in substantial measure, of the speedy and effective remedy which Section 1110 of the Bankruptcy Code by its plain language provides to them. Pan Am's efforts to postpone the inevitable would, if successful, defeat the central purpose of Section 1110. The delay arising out of carrying this case over the Court's summer recess would inflict irreparable injury on lessors and would impose an ill-advised period of new uncertainties on airline financing generally.

4. Thus the granting of certiorari—unless accompanied by a summary affirmance—would adversely affect the public interest by injecting needless substantial uncertainty with respect to both the availability and the cost of airline financing. It must be expected that this would (i) increase the difficulties of the already severely-troubled airline industry; (ii)

raise the costs of airline operation in ways that would threaten to increase air fares substantially, and (iii) increase the risks to the public safety by jeopardizing airline stability even further.

## CONCLUSION

For the foregoing reasons, as well as those being specified by others opposing Pan Am's petition for certiorari, certiorari should be denied.

Respectfully submitted,

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April 29, 1991

No. 90-1530

FILED
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OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

October Term, 1990

In re: PAN AM CORPORATION; PAN AMERICAN WORLD AIRWAYS, INC.; PAN AM SHUTTLE INC.; PAN AM EXPRESS, INC.; PAA CORP.; ALLMAT INTERNATIONAL, INC.; ALERT MANAGEMENT SYSTEMS, INC.; PAN AM COMMERCIAL SERVICES, INC.,

*Debtors in Possession-Petitioners.*

SECTION 1110 PARTIES; OMNIBUS SECTION 1110 PARTIES, PS GROUP, INC.; GRAND CENTRAL PARTNERS NO. 1; GRAND CENTRAL PARTNERS NO. 2; GRAND CENTRAL PARTNERS NO. 3; UNITED STATES AIRLEASE, INC.; CL AIRCRAFT VII, INC; C.I.T. LEASING CORPORATION; THE CIT GROUP/EQUIPMENT FINANCING, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, as indenture trustee; NMB LEASE NV; ORIX CORPORATION; NISSHO IWAI CORPORATION;

*(Caption continued on inside cover)*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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*Respondents,*

*- v. -*

PAN AM CORPORATION,

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## QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in affirming the order of the District Court for the Southern District of New York that section 1110 of the Bankruptcy Code, 11 U.S.C. § 1110, by its unqualified use of the terms "lessor," "leased" and "lease" includes within its protection lessors that have leased aircraft or equipment to a certificated air carrier in connection with a sale-leaseback transaction which did not result in the acquisition by the air carrier of aircraft or equipment "new" to its fleet?

## PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, all amici curiae (except Continental Airlines, Inc.) submitted briefs to the Court of Appeals for the Second Circuit in opposition to Debtors' appeal of the Opinion and Order of the District Court for the Southern District for New York.*

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* The following information is provided pursuant to Rule 29.1 of this Court: Evergreen International Airlines, Inc. identifies Evergreen International Aviation, Inc. as its parent company and has no nonwholly owned subsidiaries; Cobblestone Corporation identifies its parent companies as Franklin Leasing Corporation, Redes Corporation and Redes Holding Corporation and has no nonwholly owned subsidiaries; U.S. Concord, Inc. identifies Concord Leasing Inc. as its parent company and has no nonwholly owned subsidiaries; Greyhound Financial Corporation identifies Dial Corp. as its parent company and has no nonwholly owned subsidiaries; De National Investeringsbank N.V. has no parent companies and no nonwholly owned subsidiaries; Aeron Aviation Corporation has no parent companies and identifies Newair Flight, Inc., Aeron Leasing International, Inc. and Aero Leasing (USA), Inc. as its nonwholly owned subsidiaries; Credit Lyonnais/PK AIRFINANCE identifies Credit Lyonnais and Nord Banken as its parent companies and has no nonwholly owned subsidiaries; PS Group Inc. has no parent companies and identifies Statex Petroleum, Inc., USTravel Systems Inc. and Recontek, Inc. as its nonwholly owned subsidiaries; Grand Central Partners No. 1 identifies GATX GCP Corporation, DMC Aircraft Corporation No. 1 and SPB I Corp. as its general partners and has no nonwholly owned subsidiaries; Grand Central Partners No. 2 identifies GATX GCP Corporation, DMC Aircraft Corporation No. 2 and SPB II Corp. as its general partners and has no nonwholly owned subsidiaries; Grand Central Partners No. 3 identifies GATX CP Corporation, DMC Aircraft Corporation No. 3, SPB III Corp. as its general partners and has no nonwholly owned subsidiaries; and IBJ Schroder Leasing Corporation identifies IBJ Schroder Bank & Trust Company, The Industrial Bank of Japan, Ltd. and Schroders, Inc. as its parent companies and has no nonwholly owned subsidiaries.

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Respondents, Evergreen International Airlines, Inc., Cobblestone Corporation, U.S. Concord, Inc., Greyhound Financial Corporation, De Nationale Investeringsbank N.V., Aeron Aviation Corporation, Credit Lyonnais/PK AIRFINANCE, PS Group, Inc., Grand Central Partners No. 1, Grand Central Partners No. 2, Grand Central Partners No. 3 and IBJ Schroder Leasing Corporation ("Respondents"), respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of its opinion entered on April 2, 1991 (the "Petition").[1]

## STATEMENT OF THE CASE

### Background

The Court of Appeals for the Second Circuit, the District Court for the Southern District of New York and the Bankruptcy Court for the Southern District of New York have all rejected the argument in the Petition that the unqualified terms "lessor," "leased" and "lease" as used in section 1110 of chapter 11, title 11 of the United States Code (the "Bankruptcy Code") should be construed to exclude from the coverage of section 1110 all leases that do not result in the acquisition by Debtors of aircraft or equipment "new" to Debtors' fleet.

### Proceedings Below

#### A. The Bankruptcy Court

On February 22, 1991, petitioners, Pan Am Corporation and affiliated entities ("Debtors"), filed a motion in the United States Bankruptcy Court for the Southern District of New York, seeking a determination, *inter alia*, that sale-leaseback transactions entered into between Respondents and certain Debtors were not entitled to the protection of section 1110 (the "section 1110 motion"). After a hearing on March 7, 1991, the Bankruptcy Court denied Debtors' section 1110

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1. "Pet. ___" refers to the Petition.

motion and rendered a bench decision, followed by a written decision entered on March 18, 1991, in which it held, *inter alia*, that the term "lessors" as used in section 1110 includes lessors under nonacquisition sale-leaseback transactions. On March 8, 1991, the Bankruptcy Court entered an order (the "section 1110 order"), which provides in paragraph five thereof as follows:

> Transactions designated by the Debtors as "non-acquisition sale/leaseback transactions" are not disqualified from the protection of Section 1110 solely because they are "non-acquisition sale/leaseback transactions".

A. 470.[2]

**B. The District Court**

Debtors filed a Notice of Appeal in the District Court for the Southern District of New York and sought expedited review, together with a stay of the order pending the appeal. The District Court granted an expedited appeal, but denied a stay pending appeal "for failure to show likelihood of success on the merits." A. 472. On March 18, 1991, the District Court rendered its opinion and order, holding that section 1110 is unambiguous and, therefore, applies to *all* lessors, including those who lease aircraft and equipment pursuant to nonacquisition sale-leaseback transactions.

> The terms "lessor," "leased" and "lease" are not modified in any way which suggests that the statute was not meant to apply to lessors in a sale-leaseback transaction.

Pet. 17a.

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2. "A. ____" refers to the Appendix filed in connection with the decision below.

### C. The Court of Appeals

On March 19, 1991, Debtors received permission of the Court of Appeals for the Second Circuit for expedited review and were granted a stay of the District Court's order pending such review. After oral argument on April 2, 1991, the Court of Appeals affirmed, in a *per curiam* opinion, but stayed its order until 12:00 noon, Friday, April 5, 1991, to permit Debtors to seek a stay from this Court.

### D. This Court

On April 5, 1991, Justice Thurgood Marshall denied Debtors' application for a stay.

## REASONS FOR DENYING THE WRIT

### Introduction

Debtors' construction of section 1110 is totally without merit and *certiorari* should be denied. Section 1110 is clear and unambiguous on its face and the plain and ordinary meaning of such section is not at odds with the legislative intent. Using a principle of statutory construction established by this Court, five federal courts have uniformly so held. Debtors have failed to demonstrate any support for their analysis other than a short bench decision of a Bankruptcy Judge which has been reversed. Moreover, the judicial rewriting of section 1110 that Debtors seek would have a chilling effect on the raising of low cost capital by the airline industry, generate myriad issues which, undoubtedly, would leave the law in confusion and open a floodgate of potential litigation. Accordingly, as demonstrated below, there is no reason for this Court to grant *certiorari*.

## I. THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI BECAUSE THE ORDER BELOW DOES NOT RAISE SPECIAL AND IMPORTANT REASONS UNDER 28 U.S.C. § 1254(1) WARRANTING THIS COURT'S REVIEW

28 U.S.C. § 1254 provides, in pertinent part, as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 1254(1) (1991).

As the Supreme Court Rules provide, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. Indeed, it is well-settled that *certiorari* jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accordingly, as demonstrated below, on the state of the record before this Court, there are no reasons in this case warranting this Court's review; nor does any lack of uniformity exist in any decisions that have been rendered to date.

### A. Letting The Lower Court's Judgment Stand Would Provide Certainty And Predictability To Section 1110 Transactions

Section 1110 of the Bankruptcy Code provides special protection to certain lenders and *all* lessors of qualified equip-

ment to certificated air carriers.[3] Section 1110 and its predecessors have permitted lessors and conditional vendors (and, from 1978, holders of purchase money equipment security interests), to exercise their contractual rights to repossess their leased or financed equipment, notwithstanding otherwise applicable provisions of the Bankruptcy Code or the former Bankruptcy Act.

Since at least 1957, financiers have engaged in aircraft sale-leaseback transactions and relied on the benefits of section 1110 and its predecessors. S.A. 184-187.[4] The legislative history expressly shows that Congress was keenly aware that financiers in the airline industry, as well as financiers in the railroad and water transport industries, greatly relied upon such benefits in extending financing to such industries. H.R. Rep. No. 595, 95th Cong., 2d Sess. 238-39, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6198.[5]

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3. Contrary to Debtors' assertion, section 1110 is not an anomalous provision of the Code because it bypasses the automatic stay. Pet. 3. In fact, section 362 of the Bankruptcy Code, which imposes the automatic stay and which Debtors have erred in citing as section 365 (Pet. 3), contains 17 exceptions to the automatic stay after the 1990 amendments to the Bankruptcy Code. Section 1168 of the Bankruptcy Code also provides certain financiers of railroad equipment protection analogous to that provided in section 1110. Moreover, section 1110 was enacted for the benefit of air carriers (Pet. 11), and Debtors did not complain about the "anomaly" of section 1110 when they enjoyed its benefits outside of chapter 11 in their dealings with lessors and lenders who relied on the protections the statute provides.

4. "S.A. ____" refers to the Supplemental Appendix filed in connection with the decision below.

5. Sale-leaseback transactions are of an ancient vintage. *Yorkshire Ry. Wagon Co. v. Maclure*, 21 Ch. D. 309 (1882). *See, e.g., Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) ("we recognize that sale-leaseback arrangements play a useful and accepted role in our economy").

Sale-leaseback transactions are currently the predominant form of aircraft leasing transactions employed in the United States airline industry and provide a major source of reliable low-cost financing to the industry.[6] S.A. 185-186. Indeed, billions of dollars in financing are provided every year through sale-leaseback transactions, accounting for a substantial portion of the financing of the industry's aircraft fleet. S.A. 184-185. Because of the benefits of sale-leaseback transactions and the protections provided by section 1110, domestic airlines are able to compete with other borrowers in the world capital markets at a time when credit is scarce. If the special protections accorded by section 1110 were no longer available to financiers, the uncertainty of whether financiers would have any predictable remedy would have a major impact on the cost of equipment financing to the airline industry and, in all likelihood, would make sale-leaseback transactions prohibitively expensive, if at all feasible. Contrary to Debtors' assertions, any reversal of the Court of Appeals' decision would further the interests of only chapter 11 debtors that already enjoyed the benefits of section 1110. Pet. 13. However, the consequences of the judicial rewriting of section 1110 that Debtors seek would be severely adverse to the airline industry, would no doubt increase dramatically the industry's cost of financing and would dry up the current sources of capital upon which the industry is dependent for its continued growth, modernization and self-sufficiency.

Moreover, as District Judge Mukasey noted, the folly of Debtors' position is brought into sharp focus when it is realized that their position does not preclude the application of

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6. Air carriers favor these transactions to avoid debt on their balance sheets when they can no longer use tax benefits associated with ownership of the property and to procure financial benefits when the cost of leasing is lower than the cost of borrowing. *See* Kruft, *Leveraged Aircraft Leases: The Lender's Perspective*, 44 Bus. Law. 737, 738 (1989).

section 1110 to transactions that are functionally equivalent to nonacquisition sale-leaseback transactions, but only makes obtaining such protection more expensive and cumbersome. Pet. 24a. For example, selling an aircraft to a purchaser and leasing a virtually identical aircraft from that purchaser is no different than a conventional sale-leaseback. Under Debtors' facile analysis, only the first transaction involving a sale and lease, and not the sale-leaseback transaction, would have the benefit of section 1110. The bottom line is that Debtors would be in the same position as if they had done a conventional sale-leaseback, except that Debtors' transaction costs would be much higher. Such a result should not be sustained by this Court and denial of *certiorari* seems compelling.

### B. Debtors' Reading Of Section 1110 Defies Logic And Only Creates Uncertainty And The Likelihood Of Potential Litigation

The judicial rewriting of section 1110 that Debtors seek, if adopted, would create confusion by generating myriad issues and leaving the law in disarray. As District Judge Mukasey recognized:

> The distinction Pan Am would draw, based on legislative history, between sale-leasebacks and conventional leases would generate numerous additional issues that could not be resolved by that legislative history. In the future, there would likely be litigation on whether the words Pan Am hopes to read into the statute through references to selected legislative history limit the protection of § 1110 to lessors of brand new equipment, lessors of equipment new to the debtor airline, lessors of equipment new to the debtor airline and also new to any predecessor of the debtor airline, *see Braniff*, 110 B.R. at 985, or some other category. In addition, it would be unclear whether the statute

> applies to lease renewals if the equipment was new to the airline at the beginning of the initial lease term. As mentioned, Pan-Am concedes for purposes of this motion that § 1110 applies to leases of used equipment so long as that equipment is new to the airline. Yet this concession itself does not seem to arise from anything in the legislative history. . . . [T]he benefit sought to be achieved by a statute like § 1110 -- the prospect of a quick and predictable remedy that encourages potential financiers to be forthcoming -- will be lost in a miasma of potential litigation.

Pet. 23a-24a. (Footnote omitted).

There is no reason why this Court should grant *certiorari* where any determination other than affirmance of the judgment below would create issues rather than resolve an issue that, in our view, is nonexistent because of the clarity of section 1110.

### C. Debtors Themselves Are Unable To Apply Consistently The Construction Of Section 1110 They Urge Upon This Court

As fully explained by the District Court, Debtors have urged upon this Court a contorted construction of section 1110 that has no basis for a consistent application. Debtors have patently failed to demonstrate that their proposed construction can be applied -- and, indeed, Debtors themselves are unable to apply their construction -- in a uniform manner consistent with what they perceive to be the legislative purpose.

For example, the Bankruptcy Court held that lease extensions and renewals and replacement leases are entitled to the protection of section 1110. Pet. 48a. Debtors appealed the section 1110 order with respect to sale-leaseback transactions

but did not challenge the section 1110 order on lease extensions or renewals or replacement leases, although all such leases involve equipment that is *not* new to Debtors. S.A. 473. Debtors have completely failed to provide a rational explanation for the inconsistent application of the very principle they now ask this Court to validate.

Debtors have also failed to explain the basis for their contention that section 1110 requires that leased aircraft need not be new or modern but only that such aircraft, although used, old or even obsolete, be "new" to Debtors. Debtors' attempt to find support for this contention in the legislative history completely fails. As noted by Judge Mukasey, the construction urged by Debtors is not founded upon anything in the legislative history. Pet. 24a. It is incomprehensible how Debtors can urge that the purpose of section 1110 is to provide for new and modern equipment and also argue that such purpose is satisfied so long as the leased equipment is "new" to Debtors.

### D. The Application of Section 1110 Does Not Conflict With Legislative Intent Because Congress Clearly Recognized The Impact Of Section 1110 On Airline Reorganizations When It Enacted That Section

Congress was acutely aware of the impact of the special protections afforded to lessors of aircraft under section 116(5) of the former Bankruptcy Act, the predecessor to section 1110, which permitted financiers to repossess their collateral immediately without regard to the filing or pendency of a reorganization case. H.R. Rep. No. 595, 95th Cong., 2d Sess. 239-40, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6198. The legislative history clearly reveals that the enactment of section 1110 was, in fact, intended to be a *compromise* between the reorganization policy of the Bankruptcy Code and a lessor's interest in protecting its

investment. To mitigate the immediate impact of section 116(5) of the former Bankruptcy Act, Congress struck a balance between such competing interests by giving the debtor 60 days to determine whether particular leased aircraft and equipment are essential to its reorganization efforts and by leaving the choice to the debtor of whether to return equipment to the lessor or to make payment and retain the equipment. Thus, Congress explained that:

> The protection afforded the financier is similar to that contained in other sections of the bill governing use of collateral by the estate and the treatment of executory contracts and unexpired leases. . . . Under those sections, . . . [a] lessor is entitled to lease payments under the terms of the lease, and to the curing of past defaults, if the trustee elects to assume a lease. . . . *In the case of a lease, the protection is the same afforded other lessors, but the trustee is required to make a decision within 60 days of the order for relief. This should not impose an undue burden on the trustee, because transportation equipment in any major transportation company reorganization is one of the most important assets. A decision must be made quickly if the business is to be kept operating and be rehabilitated.*

H.R. Rep. No. 595, 95th Cong., 2d Sess. 239-40, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6199 (emphasis added). The foregoing language clearly reveals that Congress considered that the effect of section 1110 on the reorganization of the debtor would be the same as the effect of the sections of the Bankruptcy Code governing the treatment of executory contracts and unexpired leases (*e.g.*, §§ 362, 363(e) and 365), notwithstanding that, under section 1110, the debtor would have a strict 60-day period in which to decide whether to cure defaults with respect to its aircraft and equipment. Moreover, that language also clearly reveals that

Congress believed that lessors of aircraft deserved the same protection afforded other lessors under the Bankruptcy Code. For example, the strict 60-day decision period imposed on the debtor with respect to a lease of aircraft is similar to the time restrictions imposed upon the debtor with respect to non-residential realty leases.[7] Yet, the importance of the airline transportation industry, the potential impact on the public at large, the sheer dollar amount of the aircraft and equipment at stake, and the rate at which such equipment deteriorates in value through usage present far greater exigencies than those encountered with respect to commercial realty leases.

In sum, Debtors have failed to present any special and important reasons in the Petition that would require review by this Court. Indeed, as demonstrated below, the only issue raised in the Petition is the simple issue of statutory construction, which neither raises any Constitutional concerns nor involves any conflict among the courts of appeals warranting this Court's review.

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7. Section 365(d)(3) of the Bankruptcy Code states in relevant part:

> (3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, *but the time for performance shall not be extended beyond such 60-day period*. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

## II. THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON WARRANTING THIS COURT'S REVIEW

### A. This Case Involves A Straightforward Application Of Statutory Construction

#### 1. The Application Of The Plain Meaning Rule Established By This Court Mandates The Construction That The Clear And Unambiguous Language Of Section 1110 Apply Without Limitation To All Lessors

Section 1110 protects the right of a "lessor" of aircraft and aircraft equipment "leased" to a certificated air carrier to take possession of such equipment pursuant to the terms of its "lease." Contrary to Debtors' assertions, the plain and ordinary meaning of the terms "lessor," "leased" and "lease" as used in section 1110 is neither ambiguous nor qualified by any restrictive language in the statute.

Finding that the question presented here is a straightforward application of statutory construction, the District Court reached its conclusion that the terms "lessor," "leased" and "lease" do not implicitly or explicitly exclude nonacquisition sale-leaseback transactions by applying equally straightforward principles of statutory interpretation:

> "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'"

*United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S.

> 564, 571 (1982)) (brackets in original). *See also Demarest* v. *Manspeaker*, 111 S.Ct. 599, 604 (1991); *In re Chateaugay Corp.*, 920 F.2d 183, 184 (2d Cir. 1990).

Pet. 16a.

The District Court, concluding that such terms are clear and unambiguous and must be literally construed, followed the mandate of the Court of Appeals for the Second Circuit:

> This basic rule of statutory construction has been applied to interpret the very statute at issue here, §1110. *In re Air Vermont*, 761 F.2d 130, 134 (2d Cir. 1985) ("[where] the statute is unambiguous on its face . . . the statute's literal meaning must be applied" unless "there is something to make plain the intent of Congress that the letter of the statute is not to prevail"). In *Air Vermont*, the Second Circuit, noting that "the statute's literal meaning must be applied," reversed an order of the bankruptcy court which read into §1110 an additional, unstated statutory requirement that a conditional seller perfect its security interest by filing its contract with the Federal Aviation Administration. *Id.* at 134.

Pet. 17a. *Accord In re Continental Airlines, Inc.*, 91 Civ. 58 (RSG), slip op. (D. Del. March 26, 1991) (literal reading of section 1110 not at odds with Congressional purpose)[8]; *Braniff, Inc. v. Toren* (*In re Braniff, Inc.*), 110 Bankr. 980, 985 (Bankr. M.D. Fla. 1990) (literally construed, section 1110 applies to *all* leases); *see also* Gerstell & Hoff-Patrinos,

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8. The *Continental* decision has been appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals heard oral argument on May 1, 1991. No decision has been made.

*Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 24-25 (1987).

Moreover, Debtors have urged the Bankruptcy Court, the District Court and the Court of Appeals judicially to rewrite section 1110 by superimposing an acquisition element on leases in derogation of the plain meaning of the Statute. Each of those courts unequivocally rejected Debtors' request because courts may not superimpose additional conditions on the requirements specified in section 1110. *Braniff, Inc. v. Toren (In re Braniff, Inc.)*, 110 Bankr. 980, 984 (Bankr. M.D. Fla. 1990) (no acquisition element for leases may be imposed as an additional requirement); *California Chieftan v. Air Vermont, Inc. (In re Air Vermont, Inc.)*, 761 F.2d 130, 134 (2d Cir. 1985) (perfection of a security interest may not be superimposed on the requirements specified in section 1110).

In *Air Vermont*, the Court of Appeals for the Second Circuit faced the question of whether a conditional vendor that had failed to perfect its security interest in an aircraft by recording the contract was entitled to repossess such aircraft pursuant to section 1110. *Id.* at 130. The debtor argued that the right of a secured party with a purchase money equipment security interest in aircraft to take possession should be construed to apply only to perfected security interests. The Court of Appeals, however, found that section "1110 makes no mention whatsoever that a conditional sales contract must be recorded in order for § 1110 to apply. *Rather, § 1110, on its face, empowers a vendor of aircraft pursuant to a conditional sales contract to repossess the aircraft provided only that elements of the section are satisfied.*" *Id.* at 134 (emphasis added). The Court of Appeals concluded that:

> [S]ince the statute is unambiguous on its face in this respect, and since this is not one of those "rare and exceptional circumstances [when there is] something to make plain the intent of Congress that the letter

> of the statute is not to prevail," . . . *the statute's literal meaning must be applied, and no condition of recording may be superimposed on the requirements explicitly specified in order for § 1110 to apply.*

*Id.* at 134 (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n.33, 98 S.Ct. 2279, 2298 n.33, 57 L.Ed.2d 117 (1978), quoting *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930)) (emphasis added).

This basic rule of statutory construction employed in *Air Vermont* and by the courts below has been established and consistently applied by this Court. *E.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1575, 108 L.Ed.2d 842 (1990) (absent clearly expressed legislative intent to the contrary, the statutory language is conclusive); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989) (the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."); *Demarest v. Manspeaker*, __U.S.__, 111 S.Ct. 599, 604, 112 L.Ed.2d 608, 616 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. . . . In such cases we have followed their plain meaning.").

As this Court held recently in *West Virginia University Hospitals, Inc. v. Casey*, ___ U.S. ___, 111 S.Ct. 1138, 1147 (1991):

> As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by legislators or committees during the course of the enactment process. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'"), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

Here, too, section 1110 is clear and unambiguous and should be enforced "according to its terms."

**2. The Terms "Lessor," "Leased" And "Lease" Must Be Given Their Plain And Ordinary Meaning, Separate From The Terms "Purchase Money Equipment Security Interest" And "Conditional Sale"**

Debtors perceive the term "lease" as ambiguous because it is grouped with the terms "conditional vendor" and "purchase money security interest," both of which possess an acquisition element. Pet. 18. In an attempt to support their distorted perception, Debtors unavailingly rely on *noscitur a sociis*, a maxim of statutory construction whereby the meaning of one

term or phrase may be determined by reference to its association with the statute's other words and phrases. But "[t]he rule will not be applied where there is no ambiguity, or to thwart the legislative intent, or to make general words meaningless. The maxim is only an extrinsic aid and should only be used when the clear meaning of the words used in the statute is doubtful." 2A *Sutherland Statutory Construction*, § 47.16 at 161 (4th ed. 1984). This Court long ago determined that *noscitur a sociis* would only be applicable when ambiguity surrounds a term or phrase. This Court said:

> That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity.

*Russell Motor Car Co. v. United States*, 261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778 (1923).

Debtors have consistently attempted to create ambiguity where none exists. As District Judge Mukasey found, "[o]n its face, the statute is unambiguous." Pet. 17a. Similarly, Bankruptcy Judge Blackshear in his opinion emphasized: "The statute clearly and unambiguously refers to "lease" and "lessor" without modifying or restricting those words; that is how this Court shall read section 1110." Pet. 48a. In accord, the District Court in *In re Continental Airlines, Inc.* concluded:

> In short, because the words "lease" and "lessor" in § 1110 are unrestricted and facially unambiguous, with a meaning fully ascertainable

> without reference to the related terms, the simple observation -- that the lease is, in one respect, not like the conditional sale and the PMESI -- is of no moment in ascertaining the plain meaning of these words. Nothing on the face of the statute suggests that each word in the grouping was not intended to have its clear ordinary meaning.

App. 14a.[9]

Furthermore, in *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961), this Court held that *noscitur a sociis* is best used where the ambiguous word is capable of many meanings; thus, looking at the surrounding terms best defines the correct usage. Here, however, the words "lease," "leased" and "lessor" have an ordinary and plain meaning. If Congress wanted to deviate from that meaning, it could have inserted terms such as "new" or "acquisition" to modify the words. It chose not to do so. As the District Court in *In re Continental Airlines, Inc.* found, conditional sale contracts, purchase money equipment security interests and leases are dissimilar (App. 14a) and attempts to find complete symmetry among such terms introduces complexities and ambiguities into the statute where they do not otherwise exist. Plainly, *noscitur a sociis* is not an appropriate rule of statutory construction to be applied in this case.

Debtors also make the anomalous argument that the requirement that a lease be a "true lease," somehow renders the term "lease" ambiguous.[10] Pet. 18. However, section 1110

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9. "App. ___" refers to the appendix annexed to this brief in opposition to the Petition.

10. Similarly, Debtors argue that a nonacquisition sale-leaseback transaction is substantively identical to a general mortgage. Pet. 14-15. However, the purchase of an aircraft is not a loan; and a lease of such

(continued...)

protection extends only to leases, not to transactions that take the form of leases that are disguised financings. Congress considered this point when enacting section 1110. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 240, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6199. The strict application of section 1110 to leases does not create ambiguity; on the contrary, it shows preciseness and clarity of intent by the drafters of the statute to exclude any transaction from its coverage that is a mortgage, not a "lease." The drafters recognized that "some leases are merely disguised security agreements," and are to be so treated. *Id.*

Accordingly, there is no reason for this Court to grant *certiorari* because section 1110 has been uniformly held to be clear and unambiguous.

### B. The Second Circuit's Decision That Section 1110 Is Clear And Unambiguous On Its Face And Applies To All Lessors Is Not In Conflict With Any Other Circuit Court Decision

In determining whether to grant a petition for a writ of certiorari, this Court has often required that the decision subject to review be in direct conflict with a decision of another court of appeals. This Court has, on occasion, dismissed a writ of certiorari as improvidently granted where it has later been determined that the alleged conflict between decisions of the courts of appeals does not in fact exist. *See, e.g.,*

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10. (...continued)
aircraft back to a seller is not a mortgage. A lease differs in many important ways, both legal and economic, from a loan. For example, a lessor owns the property and, upon lease expiration, has the right to sell, release or use the equipment. In contrast, a lender generally enjoys no residual rights in the property financed and has no ability to participate in the aircraft's appreciation. As an owner, a lessor is also entitled to the tax benefits of ownership, such as depreciation deductions. 26 U.S.C. § 168.

*Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931); *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). Moreover, Rule 10 of the Supreme Court Rules specifically provides that one reason for granting *certiorari* is "[w]hen a United States court of appeals has rendered a decision *in conflict* with the decision of another United States court of appeals on the same matter. . . . Sup. Ct. R. 10 (emphasis added).

Our research has not revealed any opinion by any other court of appeals which addresses the issue presented by the Petition, although, as indicated *supra*, the Court of Appeals for the Third Circuit has heard argument but not yet decided the issue. Indeed, Debtors do not cite a single circuit or district court decision which is at odds with the decision below. The granting of review by this Court at this time is, accordingly, unwarranted.

### C. The Literal Meaning Of Section 1110 Is Consistent With The Congressional Purpose And Its Implementation

#### 1. Background

As the lower courts correctly found, the legislative history from the enactment of section 77j of the former Bankruptcy Act through the enactment of the Bankruptcy Reform Act of 1978 reveals clearly an intent that section 1110 applies to all leases. Congress' intention to promote financing of the airline industry in the way it did was firmly rooted in the concept of "title." Sections 77j and 116(5) of the former Bankruptcy Act exempted lessors and conditional sales vendors from the restraints imposed by the automatic stay because *title* to the equipment remained in the lessors or conditional sales vendors. *See* H.R. Rep. No. 1283, 74th Cong., 1st Sess. 4, 6 (1935); S. Rep. No. 1032, 85th Cong., 1st Sess. 1 (1957); H.R. Rep. No. 944, 85th Cong., 1st Sess. 1, *reprinted in*

1957 U.S. Code Cong. & Admin. News 1926, 1927. Congress clearly recognized that where title is outside the debtor, it is "appropriate to exclude what is not property of the estate from the automatic stay in a reorganization case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 240, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6199.[11]

Moreover, by its terms, section 116(5) protected the "title of any owner" to aircraft equipment "leased, subleased or conditionally sold to any air carrier." "Title" is simply not, and has never been, a "purchase-money" or "acquisition" concept. A sale-leaseback transaction, for example, whenever it might be consummated, would unquestionably place "title" in the lessor.

The legislative history of the 1957 statute is quite short and simple. The relevant committees in both houses of Congress stated that the bill's purpose was to "permit the parties to a lease or conditional sale of specified aircraft equipment to render immune from the provisions of chapter X of the Bankruptcy Act the title and right to possession of such property." S. Rep. No. 1032, 85th Cong., 1st Sess. 2 (1957); H.R. Rep. No. 944, 85th Cong., 1st Sess. 2, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926.

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11. Debtors' argument as to the historical relationship between after-acquired property clauses and leases is misplaced. Pet. 22. The advent of after-acquired property clauses created the problem of carving out an exception to the lien in after-acquired property for subsequent purchase money security interests, not for leases. Gerstell and Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 5 (1987). The exemption for leases in section 1110 and its predecessors had nothing to do with after-acquired property clauses. Instead, Congress' *rationale* for the exemption was that title to leased equipment remains in the lessor outside the estate and the automatic stay should not apply.

### 2. The Legislative History Of Section 1110 Is Fully Consistent With The Recognition Of Nonacquisition Sale-Leasebacks As Section 1110 Transactions

Sale-leaseback transactions are consistent with the legislative intent to encourage financing in the airline industry at lower costs. The Report of the House Bankruptcy Subcommittee states:

> Testimony before the Bankruptcy Subcommittee of this committee indicated that the smaller [air]lines are presently unable to attract the capital necessary for their current reequipment requirements. *Testimony also indicated that the enactment of this bill would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions.* The reason for this is the greater security afforded conditional sales vendors and lessors by the amendment to chapter X made in this bill.

H.R. Rep. No. 944, 85th Cong., 1st Sess. 1, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926, 1927 (emphasis added); *see also In re Airlift Intern., Inc.*, 761 F.2d 1503, 1507 (11th Cir. 1985) (the purpose of section 116(5) was "to enhance the borrowing ability of airlines"); 5 *Collier on Bankruptcy* ¶ 1110.01, at 110-3 (L. King 15th ed. 1990) (the predecessors to section 1110 "were designed to afford equipment financiers greater certainty than existed under the other provisions of the former Bankruptcy Act concerning such financiers").

It is clear that facilitating the financing of the aircraft industry was a prime Congressional purpose behind the amendment of section 116(5) of the Bankruptcy Act in 1957 and that it remained an important objective of that section's reenactment and expansion as section 1110 of the Bankruptcy

Code in 1978, H.R. Rep. No. 595, 95th Cong., 1st Sess. 239 (1977), *reprinted in* 1978 U.S. Code Cong. Admin. News. 5963, 6198-6199. While we do not challenge Debtors' contention that *one* of Congress' purposes in enacting section 1110 and its predecessors was to enable domestic certificated air carriers to acquire modern equipment, that certainly was not Congress' only purpose. Moreover, to adopt Debtors' position would only frustrate the purpose Debtors are urging upon this Court, since the requirement that equipment be "new" to Debtors does not, as Debtors concede, mandate that equipment itself be new or modern.

To arrive at the conclusion urged by Debtors, the broader explicit goals that Congress intended must be completely ignored. Such a myopic reading would raise more questions than it resolves. The District Court recognized that:

> In cases such as this where the legislative history appears to reflect many seemingly different but consistent goals, courts should be reluctant to rewrite the words of a statute unless the plain meaning of those words leads to a result clearly contrary to Congress' expressed intention.

Pet. 24a.

### 3. Nothing In The Legislative History Warrants Departure From The Plain Meaning Of Section 1110

Debtors are unable to cite any legislative history that states that the term "lease" for the purposes of section 1110 excludes sale-leaseback transactions which do not provide the acquisition of equipment "new" to an air carrier or *only* includes leases providing the acquisition of equipment "new" to the air carrier. In fact, the distinction between transactions that provide a new acquisition of equipment to the air carrier and those that do not was recognized by Congress when section 1110 was adopted. Carefully distinguishing between

acquisition and nonacquisition transactions, Congress added the concept of a "purchase money equipment security interest" to what became section 1110, thus limiting the class of *lenders* protected by section 1110, *but imposed no similar limitation on the class of lessors entitled to the protection of section 1110.* This is itself a persuasive indication of Congress' intent regarding the meaning of "lease" and "lessor" under section 1110. The legislative history reveals that:

> This section [1110], to a large degree, preserves the protection given lessors and conditional vendors of aircraft to a certified water carrier under section 116(5) and 116(6) of present Chapter X. It is modified to conform with the consolidation of Chapter X and XI and with the new chapter 11 generally. It is also modified to give the trustee in a reorganization case an opportunity to continue in possession of the equipment in question by curing defaults and by making the required lease or purchase payments. This removes the absolute veto power over a reorganization that lessors and conditional vendors have under present law, while entitling them to protection of their investment.

S. Rep. No. 989, 95th Cong., 2d Sess. 116-17, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5902, 5903.

If Congress wanted to restrict the operation of section 1110 to acquisition leases, it clearly would have done so through the express words of the statute. Congress knew how to distinguish among categories, and subcategories, of lessors and leases when it so desired. *See, e.g.*, section 502(a)(6) (limiting the damage claims only with respect to leases "a *lease of real property*") (emphasis added); section 365(h) (limiting consequences to lessee of rejection by trustee of "an unexpired *lease of real property* under which the debtor is the

lessor") (emphasis added); section 365(d)(3)-(4) (special rules for the timing of rejection of, and the performance of post-petition obligations under, "an *unexpired lease of non-residential real property*") (emphasis added); section 362(b)(10) (excepting from the automatic stay acts of a lessor under an *expired lease of non-residential real estate*). As indicated above, Congress knew how and, in fact, did provide an acquisition limitation in section 1110 on purchase money equipment security interest financing; by contrast, Congress left alone, notwithstanding repeated amendments to section 1110 and its predecessors, the all-encompassing and unqualified terms "lessor," "leased" and "lease."

If adopted, Debtors' view of section 1110 would eliminate the dominant type of financing needed by airlines in troubled financial circumstances (such as currently exist throughout the airline industry), *namely*, the use of a debtor's equity to obtain additional funds. B. Fritch, A. Reisman & I. Shrank, 1 *Equipment Leasing and Leveraged Leasing* 834 (3d ed. 1988). The preeminent legal authority in the equipment leasing field concludes:

> The better view from a policy standpoint, and certainly a less strained interpretation of the statute, is that §§ 1110 and 1168 [railroads] should apply to all equipment leases and conditional sales (including leveraged leases and sale-leasebacks) where there has been a change in ownership.

*Id.*

We respectfully submit that a review of the legislative history shows that Congress' purposes were multiple and that focusing on any single objective to the exclusion of others will imperil Congress' overriding policy, which was to enhance the airline industry's ability to raise capital at a cost the airlines could afford.

Given the absence of a clear and unequivocal indication that the inclusion of nonacquisition sale-leasebacks within the protection of section 1110 "will produce a result demonstrably at odds with the intention of [the] drafters", *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 242, or "would thwart the obvious purposes of the . . . statute," *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 910 (3d Cir. 1990) (quoting *Mansell v. Mansell*, 490 U.S. 581, 592 (1989), this Court should sustain the plain and unambiguous text of section 1110 and afford the aircraft lessors in sale-leasebacks their protection thereunder. *See, e.g., West Virginia University Hospitals, Inc. v. Casey*, 111 S.Ct. at 1147; *Demarest v. Manspeaker*, 111 S.Ct. at 604; *In re Chateaugay Corp.*, 920 F.2d at 184; *Air Vermont*, 761 F.2d at 134.

### D. The Petition Does Not Present Any Issues Of Compelling Importance Warranting This Court's Review

As stated, the dispute herein is solely an issue of statutory construction. Although the plain meaning of this statute may not fit with Debtors' view of the legislative purpose, it can hardly be said that the issue presented by this appeal rises to the level of importance justifying review by this Court in the absence of other compelling reasons to grant *certiorari*.

## III. THIS COURT DOES NOT NEED TO SETTLE THE QUESTION PRESENTED BECAUSE ALL AUTHORITY HOLDS THAT NONACQUISITION SALE-LEASEBACK TRANSACTIONS ARE ENTITLED TO THE PROTECTIONS OF SECTION 1110

The decisions below by Judges Lumbard, Winter and Walker of the Second Circuit, Judge Mukasey of the District Court and Judge Blackshear of the Bankruptcy Court are consistent with *all* judicial authority on this issue: *In re Continental Airlines, Inc.*, 91 Civ. 58 (RSG), slip op. (D. Del.

March 26, 1991), and *Braniff, Inc. v. Toren* (*In re Braniff, Inc.*), 110 Bankr. 980 (Bankr. M.D. Fla. 1990).

As Debtors do here, Continental and Braniff urged that the legislative history of section 1110 demonstrates that Congress intended the statute to apply only where a lessor leases aircraft *new* to an airline. Both courts unequivocally rejected that claim.

In *Braniff*, for example, the court began with an examination of the statute itself:

> *The language of Section 1110 is clear and unambiguous*; according to the statute, the benefits that Section 1110 provides are applicable when the enumerated, plainly stated elements are present and satisfied, as they obviously have been satisfied here.

*Id.* at 982-83 (emphasis added).

The court then rejected Braniff's claim that Congress proposed the legislation solely to encourage acquisition of equipment new to the airlines and, the plain language of the statute notwithstanding, intended to limit the scope of section 1110 to acquisition leases. The court especially criticized Braniff's analysis of section 1110's legislative history because, like Debtors' identical analysis here, it focused solely on the Congressional debate of a recent amendment expanding section 1110 to cover purchase money financing. The court stated:

> It is not surprising, therefore, that references to new acquisitions were featured prominently in the Congressional debates and reports constituting the legislative history of the 1978 expansion. But *focusing* on the 1978 legislative history that discusses the purposes for a particular *expansion* of the statute *without also examining the earlier base*

> *from which the expansion was being made distorts the conclusion.*

*Id.* at 983 (emphasis added).

This "earlier base" is quite revealing. The court continued:

> In the legislative history *before* the 1978 expansion into purchase money financing, there appears *no support* for the proposition that new acquisitions were intended to underlie, and be a necessary prerequisite for, the protection afforded to lessors by Section 1110's predecessors.

*Id.* (emphasis added).

The *Braniff* court quoted from House Report No. 944 to conclude that, in fact, no acquisition of any sort was required for section 1110 protection:

> Testimony *also* indicated that the enactment of this bill would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions.

*Id.* at 983-84 (emphasis added).

The court then pointed out the true purpose of the bill:

> *[T]he stated purpose of the bill* -- protecting lessors and conditional sellers -- *facilitates the reduction of capital costs to an airline regardless of whether the transaction contemplates the acquisition of new equipment* (by a new lease, for example) *or the refinancing of existing equipment* (by the renewal of an existing lease, for example).

*Id.* at 984 (emphasis added). Finally, after a review of the *entire* history, the court concluded:

> Certainly the history provides *no express legislative intent that is contrary to the plain language of the statute, which omits any "acquisition" element for leases, that would justify the Court's inclusion of this additional requirement.*

*Id.* at 984 (citations and footnote omitted) (emphasis added).

## IV. THE APPELLATE COURT'S DECISION IS CORRECT

The courts below correctly declined Debtors' invitation to judicially rewrite section 1110. The Court of Appeals affirmed the District Court's order "for substantially the reasons stated by Judge Mukasey." Pet. 8a.

The District Court found the words "lessor," "leased" and "lease" in section 1110 to be unambiguous and unrestricted: such words "are not modified in any way which suggests that the statute was not meant to apply to lessors in a sale-leaseback transaction." Pet. 17a. After an extensive review, the District Court was satisfied that the legislative history failed to demonstrate the requisite clarity to justify a deviation from the statutory language. Judge Mukasey found that "the legislative history appears to reflect many seemingly different but *consistent* goals." Pet. 24a (emphasis added). The District Court also rejected Debtors' argument that an acquisition limitation should be read into leases because section 1110 contains an explicit acquisition limitation for security interests. This argument "contradicts both logic and rules of statutory construction. Congress placed explicit limitations on one group [security interests] . . . . That difference suggests the logical conclusion that Congress actually did *not* intend so to restrict the class of protected lessors." Pet. 22a (emphasis in original).

## CONCLUSION

For all the foregoing reasons, a writ of certiorari should be denied.

Dated: May 3, 1991.

Respectfully Submitted,

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# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| IN RE: | : | |
| | : | Case Nos. 90-932 |
| CONTINENTAL AIRLINES, INC. | : | through 90-984 |
| et al., | : | |
| | : | Civil Action No. 91-58 |
| Debtors. | : | |

**OPINION**

GAWTHROP, J.[1] March 26, 1991

This is a consolidated appeal[2] from a bench opinion issued by the Honorable Helen S. Balick, Judge of the United States Bankruptcy Court for the District of Delaware, on January 30, 1991, in which Judge Balick ruled that creditors leasing aircraft equipment by "sale-leaseback" transactions are not entitled to rights under § 1110 of the bankruptcy code. *See* 11 U.S.C. § 1110. Appellants are creditors who lease aircraft under sale-leaseback leases to appellees and debtors, Continental Airlines, Inc., et al.. Five other airlines--America West Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., and USAir, Inc.--as well as the American Association of Equipment Lessors--have filed as amicus curiae in support of the appellants' position.

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1. Robert S. Gawthrop, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

2. Sixty-one creditors took twelve separate appeals, (Nos. 91-58, 91-98 through 91-104, 91-107 through 91-110, and 91-113). These appeals, which all raise the same legal question, were consolidated by the court, upon stipulation of counsel.

Appellants and amici urge this court to reverse the bankruptc court and hold that leases resulting from sale-leaseba transactions are entitled to § 1110 protection. For th following reasons, I shall so hold.

## BACKGROUND

Continental Airlines, like other major airlines in the Unite States, holds a significant number of its aircraft by lease, an does so, in large part, by so-called "sale-leaseback" transactions. Airplane leases are generally of two types: (1 acquisition leases, under which an airline acquires aircraft fo its fleet, and (2) non-acquisition leases, under which an airlin sells aircraft from its existing fleet, and then leases the sam aircraft back from the purchaser. These latter, widely used sale-leaseback transactions, allow an airline to obtain operatin capital, in exchange for a promise to pay a rental annuity The annuity, combined with the residual value of the aircra so leased, is calculated to bring the lessor a profit over th purchase price.

On December 3, 1990, Continental filed a voluntar petition in bankruptcy under Chapter 11. On January 16 1991, Continental filed a motion before the bankruptcy cour asking the court to find that the leases that debtors hold unde sale-leaseback transactions are not subject to § 1110 of th bankruptcy code.

Section 1110, in effect, exempts persons, who hav specified interests in aircraft or aircraft equipment from th automatic stay of the bankruptcy code, which stay orde attaches to a debtor's property upon the filing of a bankruptc petition. *See* 11 U.S.C. § 362(a). The stay ordinaril prevents creditors from moving against any property of th debtor to recover on any debts owed, until granted permissio to do so by the bankruptcy court. *Id.* Parties within th

protection of § 1110, however, may repossess aircraft and aircraft equipment in which they have an interest, despite the automatic stay, if the debtor does not agree to pay all obligations and cure all defaults within 60 days. By its terms, § 1110 protects "lessors", "conditional vendors", and parties with "purchase money equipment security interest[s]" (PMESIs).[3]

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3. Section 1110 provides in relevant part:

> Aircraft equipment and vessels
>
> (a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts . . . that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier . . ., to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless--
>
> > (1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and
> >
> > (2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be--
> >
> > > (A) that occurred before such date is cured before the expiration of such 60-day period; and

(continued...)

Continental sought authority from the bankruptcy court to cure defaults and meet obligations on various transactions that Continental determined to fall within § 1110. Payments due on these transactions total approximately $108 million. Continental did not seek similar authority to cure payments due under non-acquisition leases. Asserting that non-acquisition leases are not within § 1110, Continental seeks the continued use of aircraft so leased without having to pay the amounts now due on these leases, which totals approximately $58 million.

On January 30, 1990, after hearing oral argument from both parties, the bankruptcy court ruled that, unless non-acquisition leases are part of an acquisition package, they are not "leases" within the meaning of § 1110: i.e. only if an airline arranges to buy an aircraft, with the design of immediately selling it to, and leasing it back from, a financier, is the non-acquisition lease a "lease" within § 1110. *See* Tr. at 116 (Nos. 90-932 through 980, January 30, 1990). In reaching this conclusion, the bankruptcy court observed that the other transactions covered by § 1110--the PMESI and the conditional-sale contract--involve acquisitions. The court concluded that there was no basis for construing "lease" more broadly than these related terms. *See id.*, at 115-116.

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3. (...continued)

(B) that occurs after such date is cured before the later of--

(i) 30 days after the date of such default; and

(ii) the expiration of such 60-day period.

## DISCUSSION

### I. Jurisdiction over Appeal

Parties adversely affected by "final judgments, orders and decrees" of bankruptcy courts, may appeal, as of right, to the district court in the relevant jurisdiction. 28 U.S.C. § 158(a). Parties adversely affected by interlocutory orders may appeal by leave of court. *Id.* Continental argues that Judge Balick's order was not final, and that leave to appeal is inappropriate in this case. I do not address whether leave is appropriate, as I find that the order was final.

Since bankruptcy proceedings involve many parties and are frequently protracted, a strict finality requirement in the bankruptcy context, allowing appeal by right only after a reorganization plan is confirmed, could cause substantial waste of time and resources in particular cases. *See In re Amatex Corp.*, 755 F.2d 1034, 1039 (3rd Cir. 1985). Thus, the Third Circuit has declared that courts faced with bankruptcy appeals should take a pragmatic approach to the finality requirement, and treat as final, orders that in other contexts might be considered interlocutory. *Walsh Trucking v. Insurance Co. of North America*, 838 F.2d 698, 701 (3rd Cir. 1988).

The factors to be considered in determining whether the order of a bankruptcy court is final include: the impact of the issue on the assets of the bankruptcy estate, the necessity for additional fact-finding on remand, the preclusive effect of a decision on the merits of subsequent litigation, and the furtherance of judicial economy. *See Wheeling-Pittsburgh Steel Corp. v. McCune*, 836 F.2d 153, 158 (3rd Cir. 1987) (citing *In re Mevertech*, 831 F.2d 410, 414 (3rd Cir. 1987). The § 1110 issue pressed here is one of law, requires no factfinding, affects the distribution of $58 million from the

bankruptcy estate, and, when decided, will have preclusive effect on actions by future parties to sale-leaseback transactions.

Continental argues that the bankruptcy court's order, finding § 1110 not to apply to sale-leaseback transactions, is not final, because it merely postpones, rather than forecloses, the creditors' rights in their collateral. *See First American Bank of New York v. Century glove, Inc.*, 64 B.R. 958, 959 (D.Del. 1986). This is a mischaracterization. Section 1110 grants certain creditors the right to be free from the automatic stay of the bankruptcy code. The bankruptcy court's order in this case deprives appellants of these rights forever. Although the lessors retain rights in their property, these rights are fundamentally altered when subjected to the operation of the bankruptcy code. This is the essence of a final decision. This court has jurisdiction thereby.

**II. Sale-Leaseback Transactions and § 1110**

The substantive issue before the court is solely one of statutory construction: whether the terms "lessor" and "lease" in § 1110 cover lessors who purchase from an airline the very aircraft or aircraft equipment that they lease back to the airline. Before addressing this question, it is important to note a related issue not being decided.

Under the Uniform Commercial Code, financing transactions denominated as leases, but designed to create security interests, are not treated as bona fide leases, but rather are treated as security agreements for sale. *See In re Aspen Impressions, Inc.*, 94 B.R. 861, 864 (Bankr.E.D.Pa. 1984) (citing § 1-207(37) of the U.C.C.). Continental has argued that many, if not all, of the sale-leaseback leases in question on this appeal are not bona fide leases but are properly characterized as security agreements for sale, and

thus not entitled to protection under § 1110 as leases.[4] Further, Continental suggests that since these sale-leaseback transactions create security interests that are not "purchase-money equipment security interests", as that term is used in § 1110,[5] they are not subject to the protection of § 1110 at all.

However, this characterization issue, which Continental has vowed to press with respect to each of its non-acquisition leases, should it lose this appeal, is not now before me.[6] Here, I assume that the non-acquisition leases in question are bona fide leases, and thus address the legal question whether such leases are nevertheless outside the protection of § 1110, because they did not bring new airplanes to Continental's fleet.

Two courts have already written on this question, both finding that non-acquisition leases are covered by § 1110. *See In re Pan Am Corporation*, No. 91-1659, slip op. (S.D.N.Y. March 18, 1991); *In re Braniff, Inc.*, 110 B.R. 980, 985 (Bankr.M.D.Fla. 1990). These opinions are instructive. However, due to the importance of the question,

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4. Continental urges, in effect, that the word "lease" within § 1110 be read to include only "bona fide leases." Although the court is aware of no cases so holding with respect to § 1110, there is case law holding that the word "lease" in other sections of the bankruptcy code includes only bona fide leases. *See In re PCH Associates*, 804 F.2d 193 (2nd Cir. 1986) (addressing 11 U.S.C. §§ 365(d) and 502(b)(6)).

5. "Purchase money equipment security interest" is not defined in § 1110. The legislative history behind the section links this phrase to the concept as developed by the U.C.C. in § 9-107. *See* H.R.Rep.No. 595, 95th Cong., ast Sess. 240, *reprinted in* 1978 U.S.Code & Adm.News at 6199. *See also* footnote 10.

6. Nor does the *in terrorem* intimation of Continental, regarding the incremental judicial labor that such a holding could engender, have any impact on the task of fairly and accurately construing the statute.

and the difference of opinion from the court below, I will take a fresh look.

Continental asserts that the word "lease" in § 1110, when read in the context of surrounding words in the section, and in the light of the purposes of the bankruptcy code as a whole, can only be taken to include those "leases" that are designed to augment a carrier's fleet and equipment supply. Continental contends that this result is dictated by the principle of statutory construction known as *noscitur a sociis*, and by the legislative history behind § 1110. I shall address each in turn.

### A. *Noscitur A Sociis*

*Noscitur a sociis* means, literally, that a thing may be known by its associates. In the context of statutory construction, it is invoked for the proposition that the meaning of a word may be derived from the meaning of accompanying words. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *see also Black's Law Dictionary* at 956 (5th Ed., 1979). This principle has been applied by the Supreme Court, *Jarecki*, 367 U.S. at 307, and recently by the Third Circuit. *Balley v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682 (3rd Cir. 1991). Elsewhere the Supreme Court has expounded the similar principle that "words grouped in a list should be given related meaning". *See Massachusetts v. Morash*, 490 U.S. 107, 114-5 (1988); *see also Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 and n. 16 (1977) (equating *noscitur a sociis* with principle that grouped words are to be given related meaning).

Continental urges the court to apply *noscitur a sociis* to § 1110, and rule that "lease" means acquisition lease, because the other words in the list: "conditional sales" and "purchase money equipment security agreements" necessarily

involve acquisitions. I find to the contrary that *noscitur a sociis* is no aid in this context.

Maxims of statutory construction are aids in ascertaining the plain meaning of a statute, not tools to contradict plain meaning. Simply because Congress places a word in a statutory list, does not mean that the word is intended to be treated like its fellows in all respects. Indeed, the Supreme Court has recognized that when words are grouped by the disjunctive "or", they are ordinarily to be given separate meaning. *See Garcia v. United States*, 469 U.S. 70, 73 (1984). Because a word in a list "may have a character of its own not to be submerged by its association," *noscitur a sociis* should be applied, as a general rule, only where the meaning of the word is "obscure" or "doubtful". *Russel Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). *See also Jarecki*, 367 U.S. at 307 *and Balley*, 925 F.2d at 682 (*noscitur a sociis* is "wisely applied where a word is capable of many meanings").

The word "lease", as used in § 1110, suffers from no apparent ambiguity. Although a "lease" may arise in many contexts, the word is generally limited to specific transactions in property, under which an owner/lessor conveys property to a lessee for a term of years, in exchange for the lessee's promise to pay a fixed rent. *See generally Webster's Third New International Dictionary* at 1286 (1986). Sale-leaseback leases are leases within this definition. The fact that an airline sells a lessor an aircraft, before entering an agreement to lease the same aircraft back from the lessor, does not mean that the agreement is not a "lease", as the term is commonly understood. *See e.g. Frank Lyon Co. v. United States*, 435 U.S. 561, 581 (1978) (taxpayer leasing building under sale-leaseback transaction is treated as owner/lessor under a standard lease transaction and is entitled to tax benefits from depreciation).

Continental points to no ambiguity inherent to the term "lease" as used in § 1110. Rather, Continental suggests that the meaning of lease must be restricted to avoid a clash with the meaning of the other two terms in the list. However, the fact that lease transactions need not involve new acquisitions, while conditional sales or PMESIs necessarily involve acquisitions, does not mean that the three terms were not intended to have their full and ordinary meaning. Indeed, absent clear indication to the contrary, the plain meaning of the terms controls. *See Demarest v. Manspeaker*, 498 U.S. ____, 111 S.Ct. 599, 112 L.Ed.2d 608, 616 (1991).

Continental relies on a number of cases where the Supreme Court applied *noscitur a sociis*, explicitly or implicitly, to restrict the meaning of a statutory term. *See Morash*, 490 U.S. at 107; *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985); *Third National Bank*, 432 U.S. at 312; *Jarecki*, 367 U.S. at 303. These cases are fact-specific, demonstrating circumstances where the principle of *noscitur a sociis* can be helpful to elucidate a statute's meaning, but adhering to no particular rule of thumb for its application. Having considered these cases separately and in some length, I find none to be apposite to the case at bar.

*Morash* and *Jarecki* illustrate the classic circumstance for the application of *noscitur a sociis*: in each, the language in question contained an ambiguity, or constructural conundrums, that could not be solved without reference to related words. In *Morash*, 490 U.S. at 107, the Court was called upon to decide whether policies of employers to pay employees for accrued but unused vacation days are "vacation benefit plans" within the meaning of § 3(3) of the Employee Retirement Income Security Act, (ERISA), *see* 29 U.S.C. § 1023(3). Section 3(3) provides that "any plan, fund, or program" maintained to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident,

disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services" are welfare benefit plans subject to ERISA's regulatory scope. *See* 11 U.S.C. § 1023(3) (emphasis added). Despite the specific inclusion of "vacation benefits" within the section, the Supreme Court held that vacation accrual plans "payable on a regular basis from the general assets of the employer" are not benefit plans subject to ERISA's requirements.

Looking to the characteristics of the other "listed" benefits, the Court determined that Congress intended to regulate only those plans which give an employee rights that are contingent on future occurrences, or which subject an employee to risks different from the normal employment risk. 490 U.S. at 116. In so doing, the Court tacitly acknowledged that the term "vacation benefit plan", within the definition section of ERISA, could not be interpreted without reference to the other terms in that section. This is in marked contrast to the term "lease" as it appears in § 1110. "Vacation benefit plan" is a statutory construct, created by Congress to refer to a certain class of employee benefit plans. "Lease", on the other hand, is a word not invented by the bankruptcy code, and not dependent on the other provisions of the code for its meaning. Rather, it has a long history in the English language and in the common law.

The Court's opinion in *Jarecki*, 367 U.S. at 303, is similar. There, the Court was asked to address a section of the Excess Profits Tax Act of 1950, which excluded from the excise tax, "income resulting from exploration, discovery, or prospecting". *See* 367 U.S. at 305. A group of taxpayers asserted that the word "discovery" included the "discovery" or invention of new products. The Court disagreed, finding the term to be limited to income generated in the oil and gas and mining industries. 367 U.S. at 307. In doing so the court

specifically recognized that "discovery" is a word capable of many meanings that could only be interpreted with reference to the surrounding terms "exploration" and "prospecting". *Id.*

The two other Supreme Court cases cited by Continental are distinguishable for other reasons. In *Schreiber v. Burlington Northern, Inc.*, 472 U.S. at 1, the Court considered whether the prohibition against "manipulative" practices in tender offers, contained in § 14(e) of the Williams Act, covers practices that artificially affect the price of stock, but which are fully disclosed. Section 14(e) prevents persons from engaging in "fraudulent, deceptive, or manipulative acts". Noting that "fraudulent" and "deceptive" acts both involve some element of misrepresentation, the Court read "manipulative" acts to require misrepresentation as well. *See* 472 U.S. at 8. At the same time, the court noted that this definition of "manipulative" was in accord with the word as used as a term of art in common law, and as defined in the dictionary. *See* 472 U.S. at 7. In short, although the Court referred to *noscitur a sociis* to strengthen its holding, it did so not to vary the plain meaning of the term, but to confirm it.

In *Third National Bank*, 432 U.S. at 312, the Court ruled that courts may preliminarily enjoin federal banks from foreclosing on mortgages, despite the language of 12 U.S.C. § 91, which states that no "attachment, injunction, or execution" may issue against a bank of the United States. The Court's holding limits the application of the statute to injunctions that would have the effect of seizing a bank's property, and is based, in part, on the Court's recognition that the writs of "attachment" and "execution", which "sandwich" the word "injunction" in the statute, are writs used by creditors to seize bank property, while the writ of garnishment, used by banks to move against the property of others, was "conspicuously absent" from the statute's terms. 432 U.S. at 322-23.

At first blush, the Court appears to be using *noscitur a sociis* to vary the meaning of a word--"injunction"--which is otherwise without ambiguity. However, this was an extraordinary case. Historical evidence before the Court suggested a reason for preventing creditors from obtaining injunctions against and seizing property from national banks, before a judgment is entered: viz. the threat of insolvency and the need to preventing creditors from gaining preferences. Yet the Court could find no "national or local" interest to be served in forbidding injunctions against national banks, preventing the banks themselves from moving against noncreditors. 432 U.S. at 323. Indeed, the Court found that if courts were not allowed to preliminarily enjoin aggressive actions by national banks, the only result would be to give these banks a "license to inflict irreparable injury against others." In short, the Court invoked *noscitur a sociis* to avoid an irrational reading of the statute.

Continental argues that a restrictive reading of § 1110--i.e. one that excludes non-acquisition leases--would further the public policy in favor or reorganization, which is embodied within the bankruptcy code. Nevertheless, Continental does not and cannot suggest that an expansive reading of § 1110 to cover non-acquisition leases is irrational. The policy question here concerns the trade-off of pre-bankruptcy benefits for post-bankruptcy burdens. If sale-leasebacks are afforded § 1110 protection, solvent airlines are benefitted with a means to obtain inexpensive financing, enabling them to upgrade operations and stave off insolvency during a credit crunch. At the same time, if the airline goes into bankruptcy, it will be faced with the obligation of having to make payments on the sale-leaseback leases if it wishes to keep operating the aircraft held under these leases. The national economic implications of this dynamic, while subject to debate, are not so clearly undesirable to require that § 1110 be read contrary to its literal terms.

In short, because the words "lease" and "lessor" in § 1110 are unrestricted and facially unambiguous, with a meaning fully ascertainable without reference to the related terms, the simple observation--that the lease is, in one respect, not like the conditional sale and the PMESI--is of no moment in ascertaining the plain meaning of these words. Nothing on the face of the statute suggests that each word in the grouping was not intended to have its clear ordinary meaning. Thus I turn to Continental's argument with respect to legislative history.

### B. Legislative History

#### 1. Relevance to Interpretation of § 1110

Review of legislative history is appropriate in interpreting a statute, even when the statutory language is professed to be plain on its face. *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 910 (3rd Cir. 1990); *Paskel v. Heckler*, 768 F.2d 540, 543 (3rd Cir. 1985). This is not to say that plain language can be ignored. To the contrary, the words the legislature chooses are the most persuasive evidence of a statute's purpose and must be treated accordingly. *See Smith*, 898 F.2d at 910 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *United States v. American Trucking Ass'n. Inc.*, 310 U.S. 534, 543 (1940)). When the words are "clear and plain" a court must follow them, unless a literal reading produces results that are "demonstrably at odds with the intention of the drafters". *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989); *Smith*, 898 F.2d at 910.

The party who would vary the literal reading of a statute faces the heavy burden of demonstrating that the literal

reading is demonstrably at odds with the legislative intent. *See Paskel*, 768 F.2d at 543. This burden is high because the statutory language, as the embodiment of the law, contains a significance not present in the words of legislative reports. Not only does Congress place more thought on the future implications of the actual language of a statute, *see Paskel*, 768 F.2d at 544, but that language is the guide by which citizens are expected to order their affairs.

Continental contends that this stringent standard does not apply here, because it is not attempting to vary the meaning of § 1110. Continental states that the meaning of the statute, properly understood, is that meaning suggested by application of the doctrine *noscitur a sociis*. While I have rejected the view that *noscitur a sociis* alone can be applied to vary the statute's literal meaning, I acknowledge that this principle may provide some support for Continental's claim if consistent with the legislative history. Nevertheless, this does not mean that Continental can create an ambiguity with *noscitur a sociis* when none otherwise exists. The heavy burden attaches whenever a party would vary the literal reading of the statute. *Paskel*, 768 F.2d at 544. That a party can point to a maxim of statutory construction, to support a meaning other than the literal reading, is irrelevant.

Thus while I look to the legislative history, I bear in mind the limited purpose of the search. The question here is whether a literal reading of the statute to include non-acquisition leases produces a result "demonstrably at odds" with the legislators' intent, as manifest in the legislative history. *Ron Pair*, 489 U.S. at 24; *Smith*, 898 F.2d at 910.

## 2. Historical Development
### a. Section 77(j)

Section 1110 of the current bankruptcy code has its origin in like provisions of previous codes. The first such provision, § 77(j), appeared in 1935, for the benefit of equipment financiers in the railroad industry. *See* Act of August 27, 1935, Pub.L.No. 74-381, ch. 774, 49 Stat. 911 (codified at 11 U.S.C. § 205(j), repealed). Amending the then existing law regarding the reorganization of railroads, Congress added a clause that exempts lessors and conditional vendors of rolling stock equipment from the court's power in bankruptcy to enjoin repossession of such equipment. *See id.*.[7]

The purpose of this exemption, as articulated in the House Report accompanying the legislation, was to preserve the rights of trustees under "typical equipment trust agreement[s]", *see* H.R.Rep.No. 1283, 74th Cong., 1st Sess. at 4 (1935). Equipment trusts were financing devices used by the railroad industry in which trustees purchased equipment from a manufacturer, and then leased equipment to railroad companies. *See Black's Law Dictionary* at 482 (5th ed. 1979). The advantage of the equipment trust for financiers

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7. Section 77(j) provides in relevant part, that:

> . . . the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance or any judicial proceeding to enforce any lien upon the estate until after final decree: Provided, . . . [that] [t]he title of any owner, whether as trustee or otherwise, in rolling stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of an such lease or conditional sale contract, shall not be affected by the provisions of this section.

was that it gave the financier/trustee priority over claims to the equipment by holders of mortgages containing after-acquired equipment clauses.[8] However, before the passage of § 77(j), it was unclear whether the trustees' title in railroad equipment was also free from the powers of the bankruptcy court. There was case law at the time suggesting that the trust agreement should be treated, in reorganization proceedings, like a general mortgage. *See* H.R.Rep.No. 1283, 74th Cong., 1st Sess. at 4.

In deciding to resolve the doubt in favor of an exemption for equipment financiers, and in favor of the validity of the equipment trust "as a means of financing equipment purchases," the drafters of the house report noted the need to make equipment financing readily available

> . . . at a time when the development of the transportation art is providing new forms of equipment, particularly in the passenger field, of which, in interests of efficiency and economy, the carriers should be able to avail themselves, and because, after a depression the carriers are usually required to make large expenditures for equipment in order to accommodate the improved traffic . . .

*See id.*, at 4. The design of § 77(j) was thus to preserve for financiers and railroads, the benefits of an established form of financing equipment purchases. By preserving the financiers' rights to repossess equipment, § 77(j) provided low-cost financing for railroad equipment purchases.

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8. The theory behind the trustee's priority is not entirely clear. Under both leases and conditional sales the lender retains title to the equipment. Since the equipment thus does not become property of the railroad, it is isolated from general mortgages thereon. However, it also appears that equipment financiers could obtain priority over general mortgages simply by virtue of having a purchase-money claim. *See generally* 2 Gilmore, *Security Interests in Personal Property*, § 28.2 at 748.

### b. Section 116(5)

In 1957, Congress added a similar clause to the bankruptcy code to encourage equipment financing in the airline industry. *See* Act of September 4, 1957, Pub.L.No. 85-295, ch. 681, 71 Stat. 617, *reprinted in* 1957 U.S.Code Cong. & Admin.News 681 (codified at 11 U.S.C. § 516(5), repealed). Section 116(5) rendered the then-existing provisions of Chapter X, and the court's power to issue injunctions thereunder, inapplicable to property claims of lessors and conditional vendors of certain aircraft equipment.[9]

The house report accompanying this amendment likened § 116(5) to § 77(j), and "contemplated" that the enactment of § 116(5) would "result in extensive use of equipment trust financing as the financial basis for a major reequipment program [in the airline industry]." *See* H.R.Rep.No. 944, 85th Cong., 1st Sess. at 2 (1957), *reprinted in* 1957 U.S.Code Cong. & Admin.News 1926, 1927. The report also noted testimony before the house judiciary committee, which established that "smaller [air]lines" were having trouble attracting capital for reequipment requirements, and that enactment of § 116(5) would increase the availability of capital at lower rates of interest, due to the "greater security" thereby provided to lessors and conditional vendors. The

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9. Section 116(5) provided, with citations omitted, that:

> Notwithstanding any other provisions of chapter X, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances and spare parts . . . leased, sub-leased or conditionally sold to any air carrier . . . and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of chapter X if the terms of such lease or conditional sale so provide.

report thus suggested that in enacting § 116(5), Congress was concerned with encouraging a financial climate in the airline industry that would allow carriers to obtain financing to acquire new aircraft and equipment.

In 1968, Congress enacted a similar provision, § 116(6), to aid financing in the shipping industry. *See* Act of October 17, 1968, Pub.L.No. 90-586, 82 Stat. 1149, *reprinted in* 1968 U.S.Code Cong. & Admin.News 1322 (codified at 11 U.S.C. § 516(6), repealed). The house report accompanying this legislation noted that both the railroads and airlines already had "equipment trust" financing, which were exempt from the operations of the bankruptcy code. H.R.Rep.No. 1932, 90th Cong., 2nd Sess. (1968), *reprinted in* 1968 U.S.Code Cong. & Adm.News 4279.

### c. Section 1110

In 1978, when Congress passed an entirely new bankruptcy code, the protection afforded lessors and conditional vendors in §§ 77(j), 116(5) and 116(6) of the old code, were in large part retained. *See* 11 U.S.C. § 1168 (railroads) and 11 U.S.C. § 1110 (shipping and airlines). Two important changes, however, were made. Under §§ 1168 and 1110, parties holding PMESIs are added to the protected class, and all parties with protected interests are required to wait 60 days, in which the airline can move to cure defaults, before moving to repossess.

In addressing the new transportation equipment exceptions, the drafters of the 1978 house report first summarized the old, stating that the railroad exemption was originally enacted to "protect a form of financing that had obtained in the rail industry for several decades before the enactment of the first railroad reorganization provision", while the airplane and ship exemptions were enacted to "encourage[] new financing in the

relevant industries." *See* H.R.Rep.No. 595, 95th Cong., 1st Sess. at 239 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin.News at 1698. The drafters also explained that the old provisions exempted only "leases and conditional sales" on the theory that under these transactions "title of the property does not pass to the debtor, but remains in the financier". Where property is not part of the debtor's estate, the report states, "it is appropriate to exclude [it] from the automatic stay in a reorganization case". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199.

The report suggests that Congress retained the old provisions, not so much to reaffirm their initial purposes, as to preserve a system of financing to which the industry had grown accustomed. "Whether or not there was an initial need for these provisions," the report states, "their existence has become largely addicting to the financing industry, and now the industry claims it would simply cease financing of the relevant equipment if the protections were removed." *Id.* at 239, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6198.

While thus acceding to the industry's desire that the exemptions remain, Congress did see a need to soften their impact and modernize their effect. Noting that the absolute exemptions were "harsh in . . . application", the drafters of the house report explained that the 60-day grace period was to take the edge off the old provisions, and "accommodate the joint interests of the equipment financiers and . . . the reorganization process". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199. The drafters further explained that the PMESI was included within the exemption to avoid having financing transactions "unnecessarily force[d] . . . into outmoded forms," and to accommodate new forms of equipment financing "more consonant with modern law". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at

6199. The report, however, is careful to state that the addition of "equipment security interest[s]" included "only security interests that were granted to finance the acquisition of the covered equipment" and excluded "general mortgage[s]". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199.[10]

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10. Because the parties disagree as to the precise meaning of this portion of the legislative history, I reproduce it at length:

> An attempt was made to preserve the limitations on the right of the financier contained in current law. However, certain changes were made. First, the proposed sections provide protection for equipment security interests. The term includes only security interests that were granted to finance the acquisition of the covered equipment. A general mortgage is excluded. Under present law, the protection applies only to leases and conditional sales of equipment. The theory behind the present limitation is that under leases and conditional sales, title of the property does not pass to the debtor, but remains in the financier. Thus, it is appropriate to exclude what is not property of the estate from the automatic stay in the reorganization case.
>
> Changes in financing practices and in the bankruptcy laws have suggested that the former limitation be deleted, and that the protection be expanded to cover equipment security interests. Since the adoption of the original sections, there has been universal adoption of Article 9 of the Uniform Commercial Code, which abolishes conditional sales contracts, and substitutes security agreements and security interests instead. changes in the bankruptcy laws provide similar restraints for lessors of property to the debtor as exist for mortgages of secured creditors. Indeed, the Uniform commercial code acknowledges that some leases are merely disguised security agreements, and directs that they be so treated. Because retention of the prior limitation would unnecessarily force equipment financing into outmoded forms, protection of security interests was added to make financing forms more flexible and more consonant with modern law.

### 3. Interpretation

In summary, the legislative history behind § 1110 reveals the following: The notion of an equipment financing exemption was first adopted into law in the railroad industry, in § 77(j), to preserve for financiers the benefits of what was known as "equipment-trust financing", because the availability of such financing would provide inexpensive capital to railroads, allowing them to reequip and begin to pull out of the Great Depression. H.R.Rep.No. 1283 at 4. Congress later extended the exemption to the airline industry, in § 116(5), to bring equipment trust financing to air carriers, and particularly to aid "smaller" carriers in obtaining capital to reequip their fleets. H.R.Rep.No. 944 at 2, *reprinted in* 1957 U.S.Code Cong. & Admin.News at 1926. Congress made these exemption applicable to leases and conditional sales, on the theory that when title remains with the creditor, as when equipment is leased or sold conditionally, the property is not properly part of the debtor's estate when reorganization is attempted. H.R.Rep.No. 595 at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199.

Congress continued the protection provided by § 116(5) when enacting § 1110. Congress did so in apparent acquiescence to the financing industry's "addiction" to equipment trust financing. *Id.* at 239, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6198. Congress added PMESIs to the list of protected transactions, despite the fact that the holders of such interests do not hold title to the secured property, because conditional sales, under modern commercial law, have been discredited in favor of the PMESI. *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199. In adding security interests to the protected category, Congress was careful to include only purchase money interests, and not general mortgages.

To interpret the legislative history of § 1110, Continental focuses on the fact that leases and conditional sales, and equipment-trust financing in general, were the means by which carriers traditionally acquired new equipment. Continental further notes Congress's design to include, within the protection of § 1110, the modern form of acquisition financing--transactions creating purchase money security interests--while excluding general mortgage financing, aimed at raising operating capital. From this Continental gleans a Congressional intent to include only acquisition financing in the exemption, and to exclude lease transactions that do not bring new equipment to an airline, but which are used instead to bring in operating capital.

I agree that the legislative history demonstrates that Congress was concerned with facilitating acquisition financing. However, I am unable to also find that Congress was concerned only with facilitating acquisition financing, and intended § 1110 to be so limited. The legislative reports from § 1110 and its predecessors contain various remarks regarding the encouragement of financing in general. The legislative reports also show that Congress favored inexpensive financing, at least in part, because it would promote acquisition of new equipment and modernization within the transportation industries. However, Continental has pointed to no statements, in any of the predecessor statutes or the accompanying legislative reports, that manifest a Congressional desire to limit the exemption for lease financing to the goal of promoting acquisitions.

Continental contends that this function is performed by the phrase from the 1978 report, in which the drafters assert that: "A general mortgage is excluded". *Id.*, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199. However, this comment was made in the discussion of the addition of security interests to the airplane equipment exemption, and

was apparently used to distinguish common security interests from purchase money security interests.[11] Further, even if this comment is read more broadly, it does not mean that non-acquisition leases must be excluded from the protection of § 1110. Continental argues for such a result by analogizing non-acquisition leases to general mortgage financing. Yet a mortgage is not a lease. It is one thing to say that mortgages are excluded, and quite another to say that all transactions behaving like mortgages are excluded. There is nothing in the legislative history asserting the latter. Indeed, the house report to § 1110 notes that the exemptions are based on a title theory, which applies whether or not the lease is an acquisition lease.

Further, the inclusion of non-acquisition leases within the exemption can be seen to be consonant with the legislative goal of encouraging acquisitions. While non-acquisition leases do not directly result in new aircraft or equipment for a carrier, the conversion of ownership interests in existing aircraft to leasehold interests, frees up capital that an airline can use to facilitate the acquisition of such aircraft. *See Pan Am*, No. 91-1659, Slip Op. at 8.

In so noting, I recognize that the equipment financing exemption in § 1110 is at cross purposes with the automatic stay in § 362(a). As § 1110 is read more broadly, the size of the debtors' estate protected for reorganization by § 362(a) is narrowed. Since parts or sections of statutes are not to be read in isolation, but in view of the statute as a whole, *see United States v. Morton*, 467 U.S. 822, 828 (1984), it is axiomatic that statutory exemptions should not be read to emasculate the provisions that they vary. On the other hand, the inclusion of non-acquisition leases within § 1110 diminishes the protections of the automatic stay, not generally,

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11. *See* footnote 10.

but only in the airline and shipping industries. Congress certainly knew that the inclusion of equipment leases within § 1110 would limit the resources available for airlines during reorganization. That Congress nevertheless failed to restrict the type of leases exempted, and failed to suggest a need for such restriction in legislative reports, is evidence that Congress meant what it said.[12]

The legislative history demonstrates that Congress had a goal of encouraging equipment financing in the airline industry. Under the terms of § 1110, Congress chose to exempt equipment leases, without exception, from the automatic stay, as a means to achieve this goal. Continental argues that the goal would be better served if only acquisition leases were exempted. Yet it can also be argued that Congressional purposes would be better achieved if the exemption were limited to acquisition leases on new equipment, excluding leases acquiring older aircraft, because Congress was concerned with modernization. Likewise, it can be argued that the exemption should be limited to persons leasing to "smaller carriers", because Congress only

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12. Congress's knowledge of the use of sale-leaseback transactions in the transportation industries is not certain. Sale-leaseback transactions, however, are not new to the financing industry. *See e.g. Yorkshire Ry. Wagon Co. v. Maclure*, 21 Ch.D. 309, 51 L.J.Ch. 857, 47 L.T. 290, 10 Digest (Rept.) 756 (1882) (addressing sale leaseback of "locomotives and wagons"); *Brodsky v. Perth Amboy National Bank*, 259 F.2d 705 (3rd Cir. 1958) (addressing sale leaseback on real property); *see also Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-9 (3rd Cir. 1977) (recognizing that "sale-leaseback arrangements play a useful and accepted role in our economy"). In construing a statute, courts may look to the conditions of the times when it was passed. *See Stern v. United States Gypsum*, 547 F.2d 1329, 1335 (7th Cir. 1977). Legislators are presumed to have knowledge of those conditions. *See Crosby v. United States*, 8 Cl.Ct. 428 (1985). That sale-leaseback transactions were used in and prior to 1978, and Congress did not act to exclude them from the coverage of § 1110, is evidence that Congress intended them to be included.

specifically identified these carriers as having trouble obtaining financing. In short, there are numerous ways Congress could have written § 1110 in order to further its apparent goal. However, the judicial task is to give effect to what Congress actually did.

Since the legislative history here does not demonstrate a Congressional purpose at odds with a literal reading of the statute, I am compelled to find that Congress mean what it said, and hold that non-acquisition leases are entitled to § 1110 protection.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| IN RE: | : | |
| | : | Case Nos. 90-932 |
| CONTINENTAL AIRLINES, INC. | : | through 90-984 |
| et al., | : | |
| | : | Civil Action No. 91-058 |
| Debtors. | : | |

**ORDER**

AND NOW, this 29th day of March, 1991, in consideration of the appeals taken from the bench opinion and order issued on January 30, 1991, by the Honorable Helen S. Balick, United States Bankruptcy Judge, it is hereby ORDERED that the order is REVERSED.

BY THE COURT

/s/ Robert S. Gawthrop, III
Robert S. Gawthrop, III, J.

No. 90-1530

Supreme Court, U.S.
FILED
MAY 16 1991
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

**October Term, 1990**

In re: PAN AM CORPORATION; PAN AMERICAN WORLD AIRWAYS, INC.; PAN AM SHUTTLE INC.; PAN AM EXPRESS, INC.; PAA CORP.; ALLMAT INTERNATIONAL, INC.; ALERT MANAGEMENT SYSTEMS, INC.; PAN AM COMMERCIAL SERVICES, INC.,

*Debtors in Possession-Petitioners.*

SECTION 1110 PARTIES; OMNIBUS SECTION 1110 PARTIES; PS GROUP, INC.; GRAND CENTRAL PARTNERS NO. 1; GRAND CENTRAL PARTNERS NO. 2; GRAND CENTRAL PARTNERS NO. 3; UNITED STATES AIRLEASE, INC.; CL AIRCRAFT VII, INC; C.I.T. LEASING CORPORATION; THE CIT GROUP/EQUIPMENT FINANCING, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, as indenture trustee; NMB LEASE NV; ORIX CORPORATION; NISSHO IWAI CORPORATION;

*(Caption continued on inside cover)*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit**

## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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*Respondents,*

*- v. -*

PAN AM CORPORATION,

*Petitioner.*


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This Supplemental Brief is respectfully submitted by Respondents to call this Court's attention to the decision of the Court of Appeals for the Third Circuit rendered in *In re Continental Airlines, Inc., et al.*, on May 9, 1991, after the filing of Respondents' Brief in Opposition.

In its decision, the Court of Appeals for the Third Circuit affirmed the order of the District Court for the District of Delaware and concurred in its holding with the holding of the Court of Appeals for the Second Circuit that section 1110 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, applies to *bona fide* sale-leaseback transactions, even though those transactions do not involve acquisition leases. The majority and concurring opinions of the Court of Appeals for the Third Circuit are included in the Supplemental Appendix annexed to this brief.

Now that the only two Courts of Appeals that have addressed the issue of whether nonacquisition sale-leaseback transactions are included within the coverage of section 1110 are in agreement, denial of Debtors' Petition for a Writ of Certiorari is even more clearly warranted.

Dated: May 15, 1991.

Respectfully Submitted,

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## SUPPLEMENTAL APPENDIX

Supplemental Appendix A:

Majority and Concurring Opinions of the Court of Appeals for the Third Circuit in *In re Continental Airlines, Inc.*, No. 91-3204.,slip. op. (3rd Cir. May 9, 1991)

Filed May 9, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 91-3204

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IN RE: CONTINENTAL AIRLINES, INC., et al.,
*Debtors*

Continental Airlines, Inc., et al.,
*Appellants*

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On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 91-00058)

---

Argued May 1, 1991

Before: BECKER, STAPLETON and SCIRICA,
*Circuit Judges*

(Filed May 9, 1991)

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OPINION OF THE COURT

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SCIRICA, *Circuit Judge.*

Continental Airlines, Inc. and related corporations (collectively "Continental"), debtors-in-possession, appeal from a judgment of the district court. The district court ruled that aircraft held under bona fide leases, even though structured as sale-leasebacks, are exempt from the automatic stay in bankruptcy pursuant to 11 U.S.C. § 1110, and therefore are subject to repossession. We stayed the district court's order pending an expedited appeal and will now affirm.

I.

On December 3, 1990, Continental filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. This appeal concerns the treatment under the Code of various aircraft leased to Continental. Ordinarily, property in the debtor's possession, including leased property, is subject to the automatic stay in bankruptcy, which prevents any entity from removing that property to satisfy claims against the

debtor. *See* 11 U.S.C. § 362 (1988). However, under 11 U.S.C. § 1110, certain property in the possession of airlines is exempt from the automatic stay. On January 16, 1991, Continental filed a motion before the bankruptcy court seeking a declaration that certain aircraft leased to it were not subject to § 1110. This motion was opposed by the lessors of the aircraft. The bankruptcy court granted Continental's motion on January 30. On March 26, the district court reversed the bankruptcy court's order. *See In re Continental Airlines, Inc.*, C.A. No. 91-58, slip op. (D. Del. Mar. 26, 1991). This appeal followed.

This case turns exclusively on the interpretation of § 1110. That section provides in part that:

> (a) *The right of* a secured party with a purchase-money equipment security interest in, or of *a lessor* or conditional vendor *of*, whether as trustee or otherwise, *aircraft*, aircraft engines, propellers, appliances, or spare parts . . . *that are* subject to a purchase-money equipment security interest granted by, *leased to*, or conditionally sold to, *a debtor that is an air carrier. . ., to take possession of such equipment in compliance with the* provisions of a purchase-money equipment security agreement, *lease*, or conditional sale contract, as the case may be, *is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession*, unless -
>
> > (1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and

(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale, as the case may be -

(A) that occurred before such date is cured before the expiration of such 60-day period; and

(B) that occurs after such date is cured before the later of -

(i) 30 days after the date of such default; and

(ii) the expiration of such 60-day period.

11 U.S.C. § 1110 (1988). (emphasis added). Thus, on its face this section permits a "lessor of aircraft that are leased to a debtor that is an air carrier" to repossess those aircraft, notwithstanding the automatic stay provisions, unless the debtor cures its defaults within a specified time period.

As is customary in the commercial airline industry, Continental leases a large percentage of its aircraft. Approximately two thirds of Continental's current fleet consists of leased aircraft. These leases are of two types. Some are what Continental terms "acquisition" leases, under which it has acquired aircraft to augment its fleet, usually through standard lease arrangements. According to Continental, 211 of its aircraft are operating under acquisition leases. Others are "non-acquisition" leases, under which Continental has sold aircraft from its existing fleet and leased the same aircraft back from the purchaser. These sale-leaseback transactions are widely used in the airline industry as a means of raising working capital. According to Continental, 104 of its aircraft,

are operating under non-acquisition leases.[1] Aircraft lessors typically "leverage" their leases by borrowing all or part of the purchase price, secured by the lessor's rights under the lease.

In addition to providing general capital, aircraft sale-leasebacks are employed for other reasons. Some new aircraft are financed through package deals, under which an airline purchases aircraft from a manufacturer and then executes a sale-leaseback with a financier. Continental categorizes these transactions as acquisition leases, because they result in the addition of aircraft to the fleet. However, because the rental price is affected by interest rates and other timing considerations, sale-leaseback transactions are often delayed until some time after delivery of the new aircraft. In another variant, older aircraft scheduled for retirement from the fleet are sold when market conditions are propitious, and then leased back from the buyer until the retirement date. The buyer then resells the plane in the used aircraft market.

It is Continental's position that § 1110 was intended to apply only to leases which result in aircraft that are new to an airline's fleet, and not to non-acquisition leases. Continental contends that the term "lease" should be read in context with the other interests exempted under § 1110 - the "purchase money equipment security interest" and the "conditional sale" - which are acquisition devices. Continental cites to legislative history which it contends demonstrates Congress' intent to limit the § 1110 exemption to acquisition financing transactions.

The lessors maintain that the term "lease" plainly refers to any lease, whether acquisition or non-acquisition, and that the

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1. Subsequent to the district court's ruling, Continental reached agreements covering 57 of these aircraft, under which Continental will defer rental payments until September, 1991.

legislative history is insufficient to overcome that plain meaning. The lessors are supported in this appeal by several solvent airlines as *Amici*, who contend that acceptance of Continental's position would hinder financing prospects for the entire industry. Continental has made "cure" payments under its acquisition leases, but has made no payments under its non-acquisition leases.

The bankruptcy court agreed with Continental, holding that § 1110 was intended to apply only to acquisition leases. It held that Continental's sale-leasebacks were not covered by § 1110, and thus were subject to the automatic stay, unless those leases were part of a "package deal" under which aircraft were newly procured for the fleet. The district court reversed, holding that § 1110 was intended to exempt both acquisition and non-acquisition leases.

Before the bankruptcy court, Continental also made the separate argument that notwithstanding whether § 1110 covers non-acquisition leases, it was intended to apply only to "true" leases. Under this interpretation, Congress intended that § 1110 follow the Uniform Commercial Code, which treats certain transactions denominated as leases as disguised security interests. *See* U.C.C. § 1-201(37) (1987). Continental maintains that certain of its leases are not "true" leases, but are in fact disguised security interests not otherwise covered under § 1110. Neither the bankruptcy court nor the district court reached this issue. We hold that § 1110 covers only true leases, but are not presented with the question of whether any of Continental's leases fail to qualify. Continental has reserved this "characterization" issue, which may involve fact-intensive litigation before the bankruptcy court over the specific nature of each lease.

## II.

We have an independent obligation to ascertain our own jurisdiction. *See, e.g., In re Brown*, 803 F.2d 120, 121 n.2 (3d Cir. 1986). We have jurisdiction only over final orders of the district court. *See* 28 U.S.C. § 158(d) (1988). The order of the bankruptcy court declared that certain aircraft were not subject to § 1110 and could not be repossessed. We believe this order was final. In the bankruptcy context, we have adopted a pragmatic view of the finality requirement, treating orders as final that in other contexts might be considered non-final. *See, e.g., Walsh Trucking Co. v. Insurance Co. of North America*, 838 F.2d 698, 701 (3d Cir. 1988). We look to various factors, including the impact of the issue on the assets of the bankruptcy estate, the necessity for additional fact-finding on remand, the preclusive effect of a decision on the merits, and furtherance of judicial economy. *See Wheeling-Pittsburgh Steel Corp. v. McCune*, 836 F.2d 153, 158 (3d Cir. 1987). The bankruptcy court's ruling deprived the lessors of the ability to repossess their aircraft or force rental payments, and therefore was final. *See United States v. Nicolet, Inc.*, 857 F.2d 202, 206 (3d Cir. 1988) (order denying relief from automatic stay is generally appealable). Because § 1110 was designed to ensure an expedited remedy for holders of protected interests, it is important to permit prompt appeals of orders denying relief under that section.

However, this appeal is from the order of the district court, which reversed the ruling of the bankruptcy court and held that § 1110 applies to all "bona fide" leases. The district court did not reach the characterization issue, which must still be decided before any aircraft is subject to repossession. If the district court had issued a ruling that a particular plane was subject to repossession under § 1110, that order would certainly be final. *See In re Comer*, 716 F.2d 168 (3d Cir. 1983) (order lifting automatic stay and subjecting property to

foreclosure held appealable). But the finality analysis is complicated by the fact that the characterization issue remains to be decided on remand. Ordinarily, the prospect of further fact-finding on remand would weigh against a determination that a particular order is final.

However, in *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3d Cir. 1982) *cert. denied*, 459 U.S. 1206 (1983), we held that "when the bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order. . . ." *Id.* at 449. In that case, the bankruptcy court had issued an order denying intervention, and the district court had reversed. We noted the traditional rule that orders denying intervention are appealable, but orders granting intervention are not. We held that the traditional rule did not apply in bankruptcy, and we assumed jurisdiction over the district court's grant of intervention because the original order of the bankruptcy court had been final.

We have noted that *Marin Motor Oil* "stand[s] for the proposition that this court must consider finality functionally in bankruptcy cases" and its holding is properly invoked "where the issue is likely to affect the distribution of the debtor's assets, or the relationship among the creditors." *In re Brown*, 803 F.2d 120, 122 (3d Cir. 1986). We believe the rule applies in this case. Consequently, we have jurisdiction because the order of the bankruptcy court was final, regardless of whether the district court's order would otherwise have been considered final. *Cf. New Castle County v. Hartford Accident and Indemnity Co.*, Nos. 89-3814, 90-3012, 90-3030, slip op. at 41 (3d Cir. Apr. 30, 1991) (once district court order is final and properly on appeal, subsequent order of appellate court cannot render it non-final). We note that the Court of Appeals for the Second Circuit assumed jurisdiction over an identical dispute, notwithstanding that the

characterization issue also remained in that case. *See In re Pan Am Corp.*, No. 1519, slip op. (2d Cir. Apr. 2, 1991) (per curiam), *aff'g* No. 91-1659, slip op. (S.D.N.Y. Mar. 18, 1991)[2].

## III.

This appeal involves a straightforward question of statutory interpretation, albeit one of great importance to the parties. Put simply, we must determine whether the word "lease" in

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2. We recognize that the majority of Courts of Appeals do not follow the *Marin Motor Oil* approach. The majority rule is that any district court order that has the effect of remanding a matter to the bankruptcy court is not appealable unless only "ministerial" acts remain to be performed by the bankruptcy court. *See, e.g., In re St. Charles Preservation Investors, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990) (per curiam); *In re Gould & Eberhardt Gear Machinery Corp.*, 852 F.2d 26, 28-29 (1st Cir. 1988); *In re Miscott Corp.*, 848 F.2d 1190, 1192 (11th Cir. 1988); *Bowers v. Connecticut Nat'l Bank*, 847 F.2d 1019, 1023 (2d Cir. 1988; *In re County Management, Inc.*, 788 F.2d 311, 314 n.4 (5th Cir. 1986); *In re Commercial Contractors, Inc.*, 771 F.2d 1373 (10th Cir. 1985); *In re Riggsby*, 745 F.2d 1153 (7th Cir. 1984). *But see In re Gardner*, 810 F.2d 87, 90-92 (6th Cir. 1987) (following *Marin Motor Oil* approach). The Eighth and Ninth Circuits apparently suffer from intracircuit splits on the issue. *Compare In re Bestmann*, 720 F.2d 484, 486 (8th Cir. 1983) and *In re Sambo's*, 754 F.2d 811, 814 (9th Cir. 1985) (following *Marin Motor Oil* approach) *with In re Vekco, Inc.*, 792 F.2d 744 (8th Cir. 1986) and *In re Martinez*, 721 F.2d 262, 265 (9th Cir. 1983) (following majority approach).

The remaining characterization issue is more than "ministerial." The entire matter could be appealed as soon as one lease is finally declared to be subject to § 1110. *See, e.g., In re Bacchus*, 718 F.2d 736 (5th Cir. 1983) (district court ruling that certain property was "homestead" property was non-final, because an exemption could not be granted until it was determined whether the owner had intended to abandon the property). However, *Marin Motor Oil* remains the law of this circuit and we are bound to follow it.

§ 1110 was intended to apply only to acquisition leases. We note at the outset that we do not write on a blank slate. The "identical" question has been considered in two other cases, where the position now taken by Continental has been rejected. *See In re Pan Am Corp.*, No. 1519, slip op. (2d Cir. Apr. 2, 1991) (per curiam), *aff'g* No. 91-1659, slip op. (S.D.N.Y. Mar. 18, 1991); *In re Braniff, Inc.*, 110 Bankr. 980 (Bankr. M.D. Fla. 1990). We reach the same result.

## A. PLAIN LANGUAGE

We must begin our inquiry with the plain language of the statute. As the Supreme Court has noted, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *see also Demarest v. Manspeaker*, __ U.S. ___, 111 S. Ct. 599, 604 (1991); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 910 (3d Cir. 1989). With respect to the Bankruptcy Reform Act of 1978, the Supreme Court has cautioned that "[i]n such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute." *Ron Pair*, 489 U.S. at 240-41.

We recognize that the so-called "plain meaning" rule is an "axiom of experience" and does not preclude a court from employing extrinsic aids to interpretation. *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand and Gravel Co. v. United States*, 278 U.S. 41, 48 (1928)); *see also Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10

(1976); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-43 (1940); *Smith*, 898 F.2d at 910. Rather, it states a useful presumption in favor of the plain meaning that may be rebutted by other evidence. This preference rests upon the sound principle that "overemphasis on legislative guides may lead to a distorted view of the statutory purpose, 'for much less thought is spent on the future implications of committee reports and explanations on the floor than in choosing the words of a statute.'" *Paskel v. Heckler*, 768 F.2d 540, 543-44 (3d Cir. 1985) (quoting Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 381 (1947)); *see also Griffin*, 458 U.S. at 570 ("'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.'") (quoting *American Trucking*, 310 U.S. at 543). There can be no absolute rule dictating the quantum of extrinsic evidence that is necessary to overcome a facial reading of a statute. But when the statutory language speaks clearly, a party seeking to counter that language must produce other evidence that exhibits at least as much clarity.

Here, the statute plainly refers to "lessors" of aircraft that are "leased" to an airline. The sale-leaseback transactions at issue clearly were demoninated as leases, although it remains to be decided whether any of these transactions were disguised security interests. Continental does not argue that the word "lease" commonly refers to only acquisition leases. Bona fide sale-leasebacks are recognized as valid leases in various legal contexts. *See, e.g., Frank Lyon Co. v. United States*, 435 U.S. 561 (1978) (Internal Revenue Code); *In re Fashion Optical, Ltd.*, 653 F.2d 1385, 1389 (10th Cir. 1981) (bona fide sale-leaseback not fraudulent conveyance under Bankruptcy Code); *Gordon v. Motel City "B" Associates*, 403 F.2d 90 (2d Cir. 1968) (New York Bulk Sales Law); *In re Chateaugay Corp.*, 102 Bankr. 335, 343 (Bankr. S.D.N.Y. 1989) (Bankruptcy Code § 365). The leases in question were recorded under the

Federal Aviation Act, which declares them "valid as to all persons." 49 U.S.C. § 1403(d) (1988).

Rather, Continental's position is that when Congress used the word "lease" in § 1110, it intended to encompass only certain categories of leases. In essence, Continental contends that Congress neglected to insert qualifying language that would have explicitly limited the application of § 1110 to acquisition leases. Thus, accepting this argument would require us to qualify the plain meaning of the statute's words. We can do so only if the application of § 1110 to non-acquisition leases would produce a result "demonstrably at odds with the intention of its drafters." We believe it would not.

Continental asserts that the meaning of the term "lease" can be discerned only by reference to the other words that surround it. Under the doctrine of *noscitur a sociis*, the meaning of an ambiguous statutory term may be derived from the meaning of accompanying terms. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); 2A Sutherland Statutory Construction § 47.16 (1984). In addition to leases, § 1110 applies to "conditional sale contracts" and "purchase money equipment security interests." Because the latter two interests are inherently acquisition devices, Continental maintains that the term "lease" should apply only to acquisition leases.

However, *noscitur a sociis*, like any other tool of statutory construction, is merely an aid in determining the intent of the drafters. It is correctly employed together with other tools, such as legislative history and underlying policy concerns. It is of little help where other evidence reveals that Congress intended to treat the disputed term differently from its neighbors. When Congress has separated terms with the conjunction "or," it is presumed that Congress intended to

give the terms "their separate, normal meanings." *Garcia v. United States,* 469 U.S. 70, 73 (1984).

Furthermore, as with legislative history, when the doctrine is employed to qualify an otherwise plain meaning, its utility is decreased. As the Supreme Court has noted:

> That a word may be known by the company it keeps is . . . not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place . . . except in the domain of ambiguity. Moreover, in cases of ambiguity the rule . . . is not exclusive. The problem may be submitted to all appropriate and reasonable tests, of which *Noscitur a sociis* is one.

*Russell Motor Car Co. v. United States,* 261 U.S. 514, 519 (1923) (citations omitted); *see also Donovan v. Anheuser-Busch, Inc.,* 666 F.2d 315, 327 (8th Cir. 1981). As we have noted, a court is never barred from enlisting the aid of this or any other extrinsic tool, but *noscitur a sociis* is more useful when the statutory language plainly encompasses more than one meaning. Continental seeks to employ this rule to qualify language that Congress has left unqualified, rather than to clarify a facially ambiguous term. Although we do not ignore the logic of *noscitur a sociis,* we believe it does not dictate the result here, in light of the statute's plain language and evidence indicating that Congress did not necessarily intend for the term "lease" to be qualified.

Our analysis in *Ballay v. Legg Mason Wood Walker, Inc.,* 925 F.2d 682 (3d Cir. 1991) is not to the contrary. There, we held that § 12(2) of the Securities Exchange Act of 1933

does not apply to sellers of securities in the secondary market. This statute bars misrepresentations "by means of a prospectus or oral communication." 15 U.S.C. § 771(2) (1988). The plaintiffs sought to rely on this general prohibition of oral misrepresentations, which on its face is not limited to initial offerings. In reaching our conclusion, we interpreted the term "oral communication" in connection with the term "prospectus" that appeared next to it. Although we employed *noscitur a sociis* in qualifying an otherwise general term, we did so only in conjunction with an analysis of legislative history and policy concerns indicating Congress' clear intent. We noted that the term "prospectus" did not apply to secondary offerings, and that distinguishing between oral and written communications would make "no logical sense." *Id.* at 689. In addition, we stressed that the legislative history and structure of the 1933 Act, and its relation to the 1934 Securities Exchange Act, revealed Congress' clear intent to regulate only initial offerings. *Id.* at 689-93.

## B. LEGISLATIVE HISTORY

The legislative history of § 1110 and the policy concerns upon which it was based do not support the application of *noscitur a sociis*. We do not discern a clear expression of Congressional intent to limit § 1110 to acquisition financing, nor do we foresee patently illogical consequences arising from a contrary interpretation. We are concerned here with the circumstances surrounding the 1978 enactment of § 1110. But in analyzing § 1110, we also find it helpful to understand the previous statutes upon which it was modelled.

### 1. *Section 77(j)*

Section 1110, enacted with the 1978 overhaul of the bankruptcy code, has its roots in § 77(j) of the previous code.

Section 77(j), enacted in 1935, applied to certain transactions involving railroad rolling stock, and provided that:

> The title of any owner, whether as trustee or otherwise, to rolling stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

11 U.S.C. § 205(j) (1976) (repealed). Previously, § 77 had permitted federal courts to stay any suit affecting a railroad in reorganization.

This provision was enacted to preserve a form of financing known as the "railroad equipment trust," under which transportation equipment was financed separately from a railroad's other assets.

The equipment was placed in a trust and leased or conditionally sold to the railroad. Traditionally, railroad equipment trustees received priority over holders of general liens on a railroad's after-acquired property. *See United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 362 (1871). It has been suggested that this special protection was recognized because the high cost and long life span of rolling stock, combined with the railroads' frequently precarious financial situations, made such equipment an extraordinarily risky investment. Such risks were magnified if the secured property could not be recovered promptly in bankruptcy proceedings. Gerstell & Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 5-6 (1987).

Section 77(j) was enacted in response to the Supreme Court's decision in *Continental Illinois National Bank & Trust*

*Co. v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648 (1935), which cast doubt upon the ability of equipment trust financiers to repossess their equipment in bankruptcy proceedings. If this ability were denied, financing would become more expensive for the railroads. Congress passed § 77(j) to ensure that these financiers could act immediately upon their contractual rights of repossession. As one congressional report stated:

> In view of the necessity of readily financing purchases of equipment at a time when the development of the transportation art is providing new forms of equipment, particularly in the passenger field, of which, in interests of efficiency and economy, the carriers should be able to avail themselves, and because after a depression the carriers are usually required to make large expenditures for equipment in order to accommodate the improved traffic, your committee is of the opinion that any doubt should be removed with reference to the validity of the equipment trust as a means of financing equipment purchases.

H.R. Rep. No. 1283, 75th Cong., 1st Sess. 4 (1935).

### 2. *Section 116(5)*

In 1957, Congress extended § 77(j) to the airline industry. It enacted § 116(5) of the Bankruptcy Code, which provided in part that:

> [T]he title of any owner, whether as trustee or otherwise, to aircraft . . . leased, subleased, or conditionally sold to any air carrier . . . and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be

> affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

11 U.S.C. § 516(5) (1976) (repealed).

The legislative history reveals that Congress was concerned that "[m]any of the Nation's smaller airlines are today facing serious financing problems resulting from the need to replace obsolete equipment with modern aircraft" because "the smaller lines are presently unable to attract the capital necessary for their current reequipment requirements." H.R. Rep. No. 944, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926, 1926. It was hoped that § 116(5) "would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions" and would cause "extensive use of equipment trust financing as the financial basis for a major reequipment program." *Id.*

In 1968, Congress extended this provision to the shipping industry. See 11 U.S.C. 516(6) (1976) (repealed). The legislative history indicates that Congress was concerned with "problems of equipment obsolescence and the resulting need for capital improvements as the industry continues to modernize its fleet for service to the public." H.R. Rep. No. 1932, 90th Cong., 2d Sess. *reprinted in* 1988 U.S. Code Cong. & Admin. News 4270, 4280. Once again, it was hoped that the protections would "result in an increased availability of capital, and at a lower interest rate than would be demanded under present conditions." *Id.*

### 3. *Section 1110*

When the current Bankruptcy Code was enacted in 1978, the new § 1110 adopted 116(5), but in somewhat altered form. Holders of purchase money equipment security interests

("PMESIs") were added to the list of protected creditors, and the debtor was given the option of curing its defaults within a specified time period. The addition of the PMESI recognized the changes brought on by the adoption of the U.C.C., which subsumed the conditional sale contract, and recognized the purchase money priority. *See* U.C.C. § 9-312(4) (1977) (recognizing non-inventory purchase money priority), *id.* comment 3 (purchase money priority embodies previous priority for conditional sales and equipment trusts). As one congressional report stated, "[b]ecause retention of the prior limitation would unnecessarily force equipment financing into outmoded forms, protection of security interests was added to make financing forms more flexible and more consonant with modern law." H.R. No. 95-585, 95th Cong., 1st Sess. 240 (1977) [hereinafter "House Report"], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5883, 6200. The cure period was apparently added to soften the effect of the prior law, which was considered "harsh in application." *Id.* at 238.

Although Congress noted that "changes in financing practices and in the bankruptcy laws have suggested that the former limitation [of protection to lessors and conditional vendors] be deleted," *Id.* at 240, these parties remained protected by § 1110. The House Report recognized that the U.C.C. treated certain purported leases as disguised security interests, but mentioned no other distinction among leases. *See Id.* Rather, Congress appeared to recognize that the protection for leases and conditional sales contracts was continued because the holder of these interests retains title to the property. The PMESI, which does not transfer title to the holder, was discussed separately. As the House Report noted:

> An attempt was made to preserve the limitations on the right of the financier contained in current law. However, certain changes were made. First, the proposed sections provide protection for equipment security interests. The

> term includes only security interests that were granted to finance the acquisition of the covered equipment. A general mortgage is included. Under present law, the protection applies only to leases and conditional sales of equipment. The theory behind the present limitation is that under leases and conditional sales, title of the property does not pass to the debtor, but remains in the financier. Thus, it is appropriate to exclude what is not property of the estate from the automatic stay in a reorganization case.

*Id.* Thus, § 1110 apparently was based upon two distinct theories - a "title" rationale that applies to leases and conditional sales contracts, and the modern purchase money rationale that applies to PMESIs.

In addition, the House report stated that "[t]he protection afforded the financier is similar to that contained in other sections of the bill governing use of collateral by the estate and the treatment of executory contracts and unexpired leases." *Id.* at 2398-40, Specifically, the report noted that when a trustee elects to assume a lease, the lessor is entitled to "adequate protection," which ordinarily includes rental payments and the curing of past defaults. *See* 11 U.S.C. § 363(e) (1988). It noted that "[t]he major differences for transportation equipment security interests is that the proposed section defines more precisely what constitutes adequate protection. . . . In the case of a lease, the protection is the same afforded to other lessors, but the trustee is required to make a decision within 60 days of the order for relief." House Report at 240. Thus, the term "lease" in § 1110 was specifically defined in reference to the general treatment of leases elsewhere in the code.

## C. ANALYSIS

Although there are indications that one goal of § 1110 and its predecessors was to facilitate the acquisition of new equipment, we do not believe the legislative history clearly demonstrates that this was Congress' sole aim. As we have noted, Continental's interpretation can be sustained only if the relevant evidence reveals that a contrary reading would produce a result "demonstrably at odds with the intention of the drafters." *Ron Pair*, 489 U.S. at 242. The legislative history is consistent with an intent to facilitate the procurement of low-cost capital in general. *See In re Pan Am Corp.*, No. 91-1659, slip op. at 8-9 (S.D.N.Y. Mar. 18, 1991); *In re Braniff, Inc.*, 110 Bankr. 980, 984 (Bankr. M.D. Fla. 1990). Furthermore, there is evidence that Congress intended to include within the scope of § 1110 all true leases, in contrast to leases that are in reality disguised security interests. Finally, accepting Continental's interpretation would recognize arbitrary distinctions among otherwise similar lease transactions, and create further uncertainties in the application of § 1110.

We recognize that the legislative history of § 1110 and each of its predecessors expresses a desire to help the affected industries modernize their fleets. However, increasing the general availability of capital is a means of accomplishing that end. As has been noted, "the encouragement of new equipment acquisition can in no way be considered directly contrary to the broad language which Congress chose to use." *In re Pan Am*, slip op. at 8. Thus, the 1957 House Report on § 116(5) recognized that equipment modernization was hampered because "the smaller lines are presently unable to attract the capital necessary for their current reequipment requirements." H.R. Rep. No. 944, 85th Cong., 1st Sess. 2, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926, 1926. It was hoped that the new provisions "would result in

an increased availability of capital at a lower interest rate than would be demanded under present conditions." *Id.*

There is no clear indication in the legislative history of § 1110, § 116(5) or § 77(j) that Congress intended to limit protection to acquisition financing. In fact, in 1935 Congress was informed about the railroads' practice of "warehousing" equipment trust certificates following acquisition of the equipment, and selling them later when the funds were needed. *See Railroad Reorganization: Hearing before the House Committee on the Judiciary on H.R. 6249*, 74th Cong., 1st Sess. 96 (Apr. 17, 1935) (testimony of W.A. Law). We agree that "[i]ncluding all lessors within the scope of § 1110 . . . is directly consistent with Congress' stated policy of increasing capital availability at the lowest possible cost." *In re Pan Am*, slip op. at 16. Sale-leasebacks are a major form of financing in the airline industry. Several solvent airlines, supporting the lessors as *Amici*, maintain that denying § 1110 protection to sale-leasebacks would severely curtail financing prospects for the entire industry. We believe providing protection to this form of lease financing is consistent with the legislative history of § 1110.

Continental also relies on the fact that when Congress added the PMESI to the list of protected interests, the House Report noted that a "general mortgage" would not receive protection. Continental contends that its sale-leasebacks are the functional equivalent of general mortgages on specific pieces of equipment, and thus were not intended to receive protection. We do not believe this isolated comment was implicitly intended to qualify the statutory term "lease." We note first that the words "general mortgage" could refer to a general mortgage attaching to after-acquired assets, rather than a mortgage attaching to a specific piece of equipment. But even assuming Congress was referring to loans secured by

specific equipment, we do not discern that Congress explicitly intended to deny protection to bona fide sale-leasebacks.

A bona fide sale-leaseback is different from a secured loan. Unlike the holder of a security interest, the lessor retains economic ownership of the property upon the expiration of the lease. Thus, the lessor bears risks not borne by a secured party. As has been noted, "[t]he factor of economic ownership reveals the superficiality of any resemblance between the sale-leaseback transaction and a secured loan. Where the resulting lease is a true lease, a genuine change in ownership, evidenced by a transfer of residual risk, has taken place." Gerstell & Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 25 (1987). During hearings on the 1978 Act, Congress was informed that aircraft lessors relied upon the residual value of the equipment for much of their profit. *See Bankruptcy Reform Act of 1978: Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 95th Cong., 1st Sess. 810 (Dec. 1, 1977) (testimony of E.L. Dinius).

Congress rationally could have concluded that the greater residual risks of equipment lessors required added protection in bankruptcy. With respect to security interests, which do not involve such risks, Congress could have determined that only acquisition devices required such protection. In the category of security interests, Congress included only PMESIs and conditional sales, and indicated that a general mortgage was not included. It appears that the PMESI was added because it represents the modern form of the conditional sale. The U.C.C. subsumed conditional sale contracts into the modern system of secured financing. *See* U.C.C. § 9-102, comment 1 (1977) (conditional sale contracts governed by U.C.C.), *id.* § 9-312, comment 3 (purchase money priority embodies previous priority for conditional sales and equipment

trusts). But Congress' treatment of security interest does not shed light on the intended scope of protection for true leases. *See In re Braniff*, 110 Bankr. at 984 ("[w]hatever the Congress intended regarding security interests, nothing suggests that Congress intended to change the law . . . regarding lease transactions.").

The legislative history indicates that Congress distinguished between leases and security interests. This fact contradicts the application of *noscitur a sociis*. The 1978 report specifically predicated the protection of leases on the fact that title to the property remained with the lessor. Similarly, § 116(5) specifically protected the "title" of the lessor. Although the "title" theory has no place in the modern law of commercial priorities, *see* U.C.C. § 9-202 (1972), title to leased property also implies residual economic ownership and its associated risks, which are still important concerns. When the PMESI was added in 1978, Congress was clearly concerned with the distinction between true leases and "leases that are merely disguised security interests." House Report at 240. A lease that is a disguised security interest leaves essentially no residual economic ownership with the purported "lessor." *See, e.g.*, 1 Williston on Sales § 6-8 (4th ed. 1973); S. Rep. No. 95-989, 95th Cong., 2d Sess. 64 [hereinafter "Senate Report"], *reprinted in* 1978 U.S. Code Cong. & Admin. News 5850 (true lease, unlike disguised security interest, leaves economic risk with lessor at end of lease) (discussing § 507(b)(6) of the Bankruptcy Code); 55 Fed. Reg. 40502 (Oct. 3, 1990) (Federal Aviation Administration legal opinion on determining whether an aircraft lease is a true lease or a disguised security interest). Thus, Congress distinguished between leases and security interests, and rationally could have limited protection of security interests to acquisition devices, while contemplating no such limitation for leases.

As we have noted, Congress specifically directed that the term "lease" in § 1110 be considered in connection with its usage elsewhere in the Code. Bona fide sale-leaseback transactions are treated the same as other leases under other provisions of the Code. *See, e.g., In re Fashion Optical, Ltd.*, 653 F.2d 1385, 1388-91 (10th Cir. 1981) (provisions relating to fraudulent conveyances); *In re San Francisco Industrial Park, Inc.*, 307 F. Supp. 271 (N.D. Cal. 1969); *In re Chateaugay Corp.*, 102 Bankr. 335, 343 (Bankr. S.D.N.Y. 1989) (§ 365). Sale-leasebacks have been used in the transportation industry for some time. *See Yorkshire Ry. Wagon Co. v. Maclure*, 21 Ch. D. 309, 319 (1882) (sale-leaseback of locomotives and wagons). At the time § 1110 was drafted, this court "recognize[d] that sale-leaseback arrangements play a useful and accepted role in our economy." *Sun Oil Co. v. Commissioner*, 562 F.2d 258, 268-69 (3d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978). Congress clearly knows how to distinguish among different forms of leases when it so desires. *See, e.g.*, 11 U.S.C. §§ 502(b)(6) (limiting damage claim under "a lease of real property"), 365(h) (regarding rejection by trustee of a "lease of real property"), 365(c) (prohibiting assumption or assignment of a lease of "nonresidential real property").

Finally, accepting Continental's position would result in arbitrary distinctions and further uncertainties. *See In re Pan Am*, slip op. at 14-16. If § 1110 protects only leases directly resulting in aircraft new to the fleet, what is the status of a lease renewal for an aircraft that was originally new to the fleet? In addition, an aircraft that is sold by Continental and leased directly back to it would be subject to the automatic stay, but if the same aircraft were leased back to a different airline, it would apparently receive protection under § 1110. Furthermore, even if the bankruptcy court's "package deal" exception were adopted, coverage questions would arise when

a sale-leaseback offering is delayed until some time after the initial delivery of new aircraft by the manufacturer.

We believe that following the plain language of the statute is especially important in this case, where Congress intended that commercial operators rely on § 1110 in structuring long-term deals involving costly assets. We agree that "[o]therwise, the benefit sought to be achieved by a statute like § 1110 - the prospect of a quick and predictable remedy that encourages potential financers to be forthcoming - will be lost in a miasma of litigation." *In re Pan Am*, slip op. at 16. Section 1110 was intended to facilitate the procurement of low-cost capital by providing an advantage in bankruptcy to holders of certain interests. If the application of § 1110 is not predictable, potential lessors may require additional payments to compensate for this risk of uncertainty. If Congress intends to alter the incentives of § 1110, it must do so clearly.

Although we do not find a clear indication that Congress intended to limit the application of § 1110 to acquisition leases, the foregoing discussion clearly reveals that Congress intended to protect only true leases. Unlike the acquisition issue, this interpretation does not require us to qualify the plain language of the statute. Under the U.C.C. and elsewhere, the term "lease" includes only true leases. This interpretation has been applied under § 1110 and other provisions of the Bankruptcy Code. *See, e.g., In re Pan Am*, slip op. at 20 (§ 1110); *In re PCH Associates*, 804 F.2d 193 (2d Cir. 1986) (§§ 365(d), 502(b)(6)); *In re Chateaugay Corp.*, 102 Bankr. at 343-44 (§ 365) (and cases cited therein). The distinction between true leases and disguised security interests had long been accepted in commercial and tax law. We do not decide the precise standards under which the bankruptcy court is to decide this issue. However, we note that when Congress discussed the definition of "security interest" under the Bankruptcy Code, it noted that "[w]hether

a consignment or a lease constitutes a security interest under the bankruptcy code will depend on whether it constitutes a security interest under applicable State or local law." House Report at 314; Senate Report at 26.

In sum, the legislative history simply does not reveal a sufficiently clear congressional intent that would permit us to qualify the plain words of the statute. Encouraging acquisition of new equipment was certainly one aim of § 1110. But as the district court noted, there are many ways in which § 1110 could be rewritten to reflect various goals alluded to in the legislative history. Because the legislative history reflects a strong concern with fleet modernization, it could be argued that § 1110 should apply only to newer equipment. Similarly, because the 1957 legislative history was concerned only with the financial condition of "smaller carriers," it could be argued that § 1110 should apply only to those entities. *In re Continental*, slip op. at 29. Absent clearer evidence of Congress' actual intent, we must follow the plain language of the statute. We leave it to Congress to qualify that language further.

## IV.

We hold that § 1110 applies to bona fide sale-leaseback transactions. Thus, we will affirm the order of the district court and remand for proceedings consistent with this opinion.

BECKER, Circuit Judge, concurring in the judgment.

I agree with most of what Judge Scirica says in the opinion of the court. However, I am not as certain as Judge Scirica that the language of the statute is "plain." We do not read statutes in a vacuum. The critical statutory sentence that we

must construe[1] is grammatically awkward, is fairly opaque, and is freighted with references to instruments (PMESIs and conditional sales) generally considered to be limited to acquisition financing. Moreover, notwithstanding that non-acquisition sale-leaseback arrangements are technically "leases," there is not denying that the word commonly connotes an acquisition device. In other words, although I concede that the language of the statute certainly is susceptible to the meaning that Judge Scirica attributes to it -- and probably even means what he says it does -- I am left with serious doubts.

On the other hand, when I go to the legislative history, which Continental touts as its forte in this case, even when I acknowledge the frequent references to new acquisition in § 1110's predecessor statutes, I nonetheless find Continental's position underwhelming. That is because, as is referenced by Judge Scirica, the legislative history contains countervailing evidence: (1) that the sale-leaseback device had long been

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1. The relevant sentence states:

> (a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts . . . that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier . . ., to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not [unless otherwise provided] affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession. . .

11 U.S.C.§ 1110 (1988).

used for non-acquisition financing;[2] and (2) that Congress had long been concerned with the general cost of capital in various transportation industries and was not just focusing on acquisition financing. In other words, the legislative history seems to me to be a stand-off.

What is determinative for me is the fact, noted above, that Congress well knew the non-acquisition potential for sale-leaseback financing yet did not do what would have been so simple, i.e., to add the two little words "newly acquired" to the statute to avoid any question. Given this equivocal legislative history, it is my view that since the statute could very well mean what the lessors say it means,[3] the factors noted above -- the failure of Congress clearly to impose the acquisition limitation which Continental reads into the statute coupled with the fact that Congress had to know that it might be creating an ambiguity by leaving the limitation out -- are fatal to Continental's position. I therefore concur in the judgment of the court.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

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2. *Amici* also make a forceful argument in this regard that even conditional sales have been used for more than a century as a means of non-acquisition financing and that Congress was aware of this practice.

3. Thus, this might be styled as a case of "somewhat plain meaning."